92-1272

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1992

JIT KIM LIM, M.D.

Plaintiff,

v.

CENTRAL DUPAGE HOSPITAL, HEALTHCORP AFFILIATES, DAVID FOX, GEORGE HOLZHAUER, WENDELL FINKBEINER, PETER BRUSCA, M.D., RAYMOND DIETER, M.D., DAVID BARRETT, M.D., MUHAMMAD SHARIF, M.D., ROBERT WILSON, M.D., ANGELO SORCE, M.D., DONALD WHITE, M.D., WILLIAM PETRANDO, M.D., JEFFREY JOHNSON, M.D., DENNIS BAKER, M.D., JAMES O'BRIEN, M.D., VINCENT SACKETT, M.D., RENATO IMANA, M.D., HARB BOURY, M.D., DOUGLAS B. MAINS, M.D., RONALD M. SEVERINO, M.D., J. GEORGE HANDLEY, M.D., RICHARD NIEDBALLA, M.D., RICHARD MEYER, M.D., NEIL AGRUSS, M.D., RICHARD DOMINGUEZ, M.D., JAMES GRISSOM, M.D., DONALD GUSTAFSON, M.D., JOHN A. HEITZLER, M.D., MONA KEA SOUTH ENTERPRISES, INC., MONA KEA LEASING ASSOCIATION, MONA KEA OWNERS ASSOCIATION, and MONA KEA SOUTH PROFESSIONAL CONDOMINIUM ASSOCIATION,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit Court of Appeals erred in affirming the district court's *res judicata* dismissal of plaintiff's second suit alleging Federal antitrust law violations arising out of summary suspension of his hospital staff privileges where:

   A. Plaintiff had originally advanced, but had been compelled to withdraw, Federal antitrust claims from his first suit (and gone to adverse judgment on an alternative civil rights theory) **only** by reason of a then recent and controlling Seventh Circuit decision (*Ezpeleta v. Sisters of Mercy Hospital*, 800 F.2d 112 [7th Cir., 1986]) wherein the Court of Appeals threatened Rule 11 sanctions for pursuing Federal antitrust claims in hospital privilege cases.

   B. During the pendency of the appeal of his first suit plaintiff had moved for remandment of his appeal to reinstate his antitrust claims when this Court's opinion in *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658 (1988) effectively overruled *Ezpeleta*, but his motion for remand was rejected *sub silentio* when the Seventh Circuit affirmed dismissal of his civil rights claims without ruling on the motion for remand.

   C. Plaintiff filed a motion seeking Rule 60(b)(6) relief fromthe judgment in his first suit in order to reinstate his antitrust claims, but that motion was denied.

   D. During the pendency in the district court of plaintiff's Rule 60(b)(6) motion to open the prior judgment, and during the pendency of defendants' motions to dismiss plaintiff's second suit as *res judicata*, an action brought on behalf of another victim of the same series of events, asserting virtually identical claims against many of the same defendants, and filed the same day as plaintiff's second suit, was being actively litigated on the merits before another judge of the same district court.

PARTIES TO THE PROCEEDING

The parties to the proceeding are all named in the caption shown on the cover of this Petition for Writ of Certiorari. Pursuant to S. Ct. R. 29.1, the petitioner states that Healthcorp Affiliates is the parent corporation of Central DuPage Hospital. No party has publicly owned parents, subsidiaries, or affiliates.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jit Kim Lim, M.D., respectfully prays that a writ of certiorari issue to review the judgment of the Seventh Circuit

Court of Appeals entered in Lim v. Central DuPage Hospital, 91-2981, entered August 11, 1992 (rehearing denied October 26, 1992). The questions presented are purely legal ones. Because the decision of the Seventh Circuit Court of Appeals represents a clearly abusive application of the doctrine of *res judicata* resulting in a fundamentally unjust and unfair preclusion of a cause of action, this case is appropriate for summary disposition on the merits pursuant to S.Ct.R. 16.1.

OPINIONS BELOW

The opinion of the Court of Appeals in the instant case is reported at 972 F.2d 758 (7th Cir., 1992). The opinion is reprinted in full in the Appendices to this Petition. (App.A. 1-12)

The opinion of the Court of Appeals in petitioner's first suit is reported at 871 F.2d 644 (7th Cir., 1989)

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254 (1) as the review of the judgment of a case in the Court of Appeals.

Jurisdiction in the Court of Appeals was premised on 28 U.S.C. § 1291 as an appeal from a final decision of a district court.

Jurisdiction in the district court was premised on 28 U.S.C.§ 1331 as an action arising under federal law and 28 U.S.C.§ 1337

as an action arising under federal law regulating restraints on trades and monopolies. The complaint alleged violations of 15 U.S.C. §§ 1, 2, 15 and 26 and 18 U.S.C. § 1961 *et seq.* Additional counts asserted state law claims premised on pendant jurisdiction.

On August 11, 1992 the Circuit Court of Appeals affirmed the district court's *res judicata* dismissal of plaintiff's suit. A timely petition for rehearing was filed. The Petition for Rehearing was denied by order entered October 26, 1992 (App.B) This Petition for Writ of Certiorari is placed for mailing within the time limited by Supreme Court Rule 29.2.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

None. This Petition for Certiorari arises out of a *res judicata* dismissal of petitioner's second suit. While the jurisdictional chain leading to this Court is premised on the statutes cited (see **JURISDICTION**, *supra*), the questions presented are common-law.

STATEMENT OF THE CASE

This Petition arises out of the Court of Appeals' affirmance of the district court's res judicata dismissal of plaintiff's second suit alleging violations of Federal antitrust law in connection with a series of events culminating in the suspension of his medical staff privileges at Central DuPage Hospital.

Preface: Identity of defendant groupings

In the district court and before the Seventh Circuit the defendants were identified by two group designations: the Central DuPage Hospital (CDH) defendants and the Mona Kea defendants. In view of the brevity requirement of this Court's Rule 14.4 and the narrow res judicata issue presented by this Petition, it would unnecessarily lengthen and complicate the statement of facts to fully identify and delineate the conduct attributed to each defendant. (These matters are fully set forth in Appendix C, plaintiff's First Amended Complaint.) For purposes of this Petition, it is sufficient to state that the Central DuPage Hospital (CDH) defendants' conduct centered on hospital related activities directly affecting plaintiff's staff privileges at Central DuPage Hospital. Additionally, nearly all of the Central DuPage Hospital defendants were also parties defendant in the first suit filed by plaintiff. The Mona Kea defendants' conduct centered on activities primarily involving the Mona Kea Professional Park where plaintiff and most defendants were owners/tenants of office condominiums. The Mona Kea defendants were not parties to plaintiff's first suit.

Events prompting plaintiff's first suit

Plaintiff, Jit Kim Lim, M.D., is a medical doctor board certified in the surgical specialty of neurologic surgery. Between 1975 and March 1986 Dr. Lim enjoyed full and unrestricted staff privileges in neurosurgery at Central DuPage Hospital (CDH). (App.C-2, 5, 11) In December 1984 Dr. Lim entered a contractual relation with a chiropractor, Dr. Leonard Chinnici, to engage in associated practice under the name "The Neuro-Spinal Center". Dr. Lim and Dr. Chinnici agreed that they would share the use of their respective offices for the purpose of treating their respective patients and to cross-refer patients when appropriate and in the best interest of the patient. (App.C 5-6) Dr. Lim's offices were located in the Mona Kea Professional Park where the many of tenants and owners were physicians and other health care providers and also on staff or otherwise professionally affiliated with Central DuPage Hospital. (App.C 3-5)

In March 1985 Dr. Chinnici began to see patients at Dr. Lim's office in Mona Kea Professional Park. (App.C-6) The response of the medical physicians was immediate; on April 5 an owners association meeting was called regarding "Chiropractic Occupancy at Mona Kea". (App.C-6) The Mona Kea South Professional Condominium Association served on plaintiff a "Demand to Cease and Desist Violation" claiming "administration, consultation or performance of chiropractic services" violated the condominium by-laws. (App.C-6) On April 17, 1985 the Condominium Association voted to "confirm" issuance of the Cease and Desist Notice. (App.C-7) The dispute spread beyond the confines of the condominium association by way of rumor and innuendo, including bulletin board posting of yellow page advertising for the Neuro-Spinal Center at the Medical Staff lounge at Central DuPage Hospital

in May 1985. (App.C 7-8) In June 1985 Defendants Mains and Severino acting on behalf of the Mona Kea Condominium Associations wrote Dr. Lim expressing "extreme displeasure" about Dr. Lim's association with Dr. Chinnici, asserting that the Lim-Chinnici relationship reflected poorly on Mona Kea and the physicians practicing there, and that "the Central DuPage Hospital Staff and the DuPage County Medical Society had been notified of your association with doctors of chiropractic." (App.C 7-8) Throughout the summer of 1985 Dr. Lim was repeatedly warned by defendant Severino and others that no good could come to Dr. Lim of his association with chiropractic physicians. (App.C 6) In September 1985 the Mona Kea condominium associations voted to amend the Declaration of Condominium in order to expressly prohibit chiropractic use or occupancy. (App.C 9-10) Immediately following the amendment to the condominium by-laws, the number and quality of patient referrals to Dr. Lim from members of the Central DuPage Hospital Staff decreased drastically. (App.C 10)

On November 1, 1985, Dr. Chinnici employed two additional chiropractic physicians to work out of Dr. Lim's office and requested that their names be added to the Mona Kea directory of tenants/occupants. (App.C 10) On November 7 Dr. Lim was informed by the Surgical Audit committee of the Central DuPage Hospital Staff of the initiation of an audit of his neurosurgical cases. An extensive audit was conducted commencing in January 1986. (App.C 10) On January 10, 1986, in an effort to escape from the dogged and escalating pressures being brought to bear on him, Dr. Lim wrote Dr. Chinnici terminating the "Neuro-Spinal Center" agreement. (App.C 10-11)

However, the juggernaut had established an independent momentum. The audit commenced in January continued through

March, 1986. Claimed irregularities were cited which were satisfactorily addressed by Dr. Lim. (App.C 10) Nonetheless on March 24, 1986 the Medical Executive Committee of the Central DuPage Hospital summarily suspended Dr. Lim's staff privileges. (App.C 11) Peer review appeals were pursued, but without success. On August 25, 1986 the Board of Governors of CDH voted to confirm and make permanent the suspension of Dr. Lim's staff privileges. (App.C 11)

The First Suit

On August 26, 1986, Dr. Lim filed suit in the District Court for the Northern District of Illinois asserting claims for monetary damages and other relief under Federal antitrust law, as well as pendent state law claims. Two days after plaintiff filed his suit the Seventh Circuit Court of Appeals issued its per curiam decision in Ezpeleta v. Sisters of Mercy Hospital (7th Cir., 1986) 800 F.2d 112, wherein the Seventh Circuit held that peer review procedures conducted under mandate of state law peer review statutes were exempt from antitrust actions under the state action exception. In *Ezpeleta* the Seventh Circuit also stated per curiam that "any future antitrust challenges to decisions regarding staff privileges under the Indiana medical peer review process may be deemed frivolous because of the clear bar of the state action doctrine as applied by this court..." (800 F.2d at 119). Defendants moved to dismiss plaintiff's complaint asserting two bases: (1) that their actions were immune from antitrust jurisdiction by reason of the state action doctrine as applied in *Ezpeleta* and precursors, and (2) that the complaint did not allege a sufficient nexus to interstate commerce to invoke Federal antitrust jurisdiction. (App.E, 9)

Confronted with *Ezpeleta* (and other Seventh Circuit decisions therein cited), plaintiff withdrew his antitrust claims in March 1987[1] and substituted claims under the civil rights acts (42 U.S.C. secs. 1981, 1982 and 1985). The district court dismissed these claims in January 1988 holding that plaintiff's interest in continued medical staff privileges did not rise to the dignity of a protected property right. Plaintiff appealed to the Seventh Circuit. During the pendency of the appeal, and after plaintiff had filed his main brief, the Supreme Court issued its decision in *Patrick v. Burget* (1988), 108 S.Ct. 1658, holding that the state action doctrine did not preclude federal antitrust jurisdiction in peer review cases. Upon issuance of the Patrick decision, plaintiff's counsel requested that plaintiff audit his billings to determine the amounts attributable to "interstate commerce" sources. (App.E 10) Having received the results of the audit and satisfied that the sums involved were at least arguably "nexial" to interstate commerce, plaintiff filed, shortly before oral argument, a motion with the Court of Appeals entitled "Motion for Leave to Cite Recent Authority and for Additional Procedural Relief." (App. E 7-13) In his motion plaintiff acknowledged that his withdrawn (under threat of *Ezpeleta*) antitrust claims were not dispositive of the issues pending on appeal as the case stood; but clearly informed the Court of Appeals that plaintiff had originally sought recovery under an antitrust theory, that the Court of Appeals itself had precluded that theory by its opinion in *Ezpeleta*, and that plaintiff wished to reassert his antitrust claims now that the roadblock of *Ezpeleta* had been removed. After oral argument, and then only in response to a request from the Court of Appeals, the defendants filed written

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[1]This court did not grant *certiorari* in *Patrick v. Burget* until October 5, 1987, nearly seven months after plaintiff had withdrawn his antitrust claims.

objection to the request for remandment. (App.F) On March 24, 1989 the Court of Appeals issued its written opinion affirming the district court's dismissal of plaintiff's civil rights claims. *Lim v. Central DuPage Hospital*, 871 F.2d 644 (7th Cir. 1989) The opinion made no mention of plaintiff's motion requesting remandment.

Plaintiff's Petition for Rehearing was denied in May 1989.

Proceedings following denial of rehearing

On October 13, 1989, plaintiff filed a Rule 60(b)(6) Motion in the district court seeking to reopen the judgment of January 1988 to enable him to reinstate his antitrust claims. Also on October 13, 1989, plaintiff filed a new action against all of the defendants named in his original action (collectively, the CDH defendants) as well as certain additional defendants (collectively, the Mona Kea defendants. Plaintiff's second suit was docketed under number 89 C 7753. On the same day, October 13, 1989, Dr. Chinnici, the chiropractor with whom plaintiff had been associated in the Neuro-Spinal Center, filed suit in district court against many of the same defendants. Dr. Chinnici's suit was docketed 89 C 7752. Both plaintiffs Lim and Chinnici asserted causes of action under Federal anti-trust law, RICO and pendent state claims. Dr. Lim's claim was assigned to the same district judge who had heard his first case; Dr. Chinnici's case was assigned to a different judge. The district court stayed proceedings in plaintiff's new suit pending ruling on the Rule 60(b)(6) motion. On February 22, 1992 the district court denied plaintiff's Rule 60(b) motion. Plaintiff filed a timely appeal of the denial of his Rule 60(b)(6) motion but, for reasons that will be elaborated *infra*, allowed that appeal to be dismissed for want of prosecution on August 31, 1990. (App.A 2)

On March 29, 1990 the CDH defendants moved to dismiss plaintiff's second suit asserting that the claims therein were barred by the doctrine of *res judicata*. The CDH defendants' motion to dismiss was supported by a memorandum of law, **submitted under signature of the same attorney who had signed the objections to remandment during the prior appeal**, and containing the representations that during the that appeal "[p]laintiff made no effort to amend his complaint to re-plead his anti-trust counts, instead choosing to press on with the merits of his civil rights theory" (App.D, 5), "plaintiff failed to attempt any such amendment before the Seventh Circuit" and "[r]ather than asserting all available theories of recovery against the defendants, plaintiff elected to confine his theory of liability to allege civil rights violations pursuant to 42 U.S.C. secs. 1981, 1982 and 1985(3)." (App.D 8) The CDH and the Mona Kea defendants also asserted objections to the sufficiency of plaintiff's RICO allegations. (App.D) On June 14, 1990 plaintiff filed a Response to the *res judicata* portion of the CDH defendants' motion to dismiss. Attached to plaintiff's response was a copy of the "Motion for Leave to Cite Recent Authority and for Additional Procedural Relief" that plaintiff had filed with the Court of Appeals in his prior appeal. (App.E) Plaintiff thereafter amended his complaint to correct defects in the pleading of the RICO claims and to include allegations summarizing the course of plaintiff's first suit, including the attempt to obtain remandment while on appeal, and the denial of Rule 60(b)(6) relief. (App.C, 11-14)

On September 24, 1990 the CDH defendants renewed their previously filed Motion to Dismiss, including the clearly false representations concerning plaintiff's failure to seek remandment, and to which plaintiff had already filed a Response on June 14, 1990 including attachment of a copy of the motion seeking remandment. On December 5, 1990 the district court granted

the CDH defendants' *res judicata* motion to dismiss. (App.G) In granting that motion, the district court emphasized plaintiff's **failure to make any effort to pursue amendment or reinstatement of his antitrust claims in the Court of Appeals**. (App.H, 9-10) On February 1, 1991 the CDH defendants moved for Rule 54(b) final judgment. On the same date plaintiff was granted leave to file a motion to reconsider within 7 days [R.86] On February 14, 1991 the Mona Kea defendants were granted leave to withdraw their answer and file motions to dismiss. [R.87-88] On March 8 plaintiff tendered his motion to vacate the order of December 5, 1990, which the district court declined to entertain as untimely. [R. 90-91] The district court entered final judgment in favor of the CDH defendants on March 8, 1991. (App.H [R.94-95]) On March 18, 1991 plaintiff served and filed a motion to amend judgment to reinstate causes of action. [R.96-97] Thereafter plaintiff and the Mona Kea defendants filed memoranda concerning the Mona Kea defendants' motion to dismiss. [R.100-104] On July 23, 1991, the district court dismissed plaintiff's complaint as to all defendants and entered judgment against plaintiff and in favor of all defendants. (App.I [R.106-108]) Notice of appeal was filed August 21, 1991. [R.109]

The instant appeal was orally argued March 30, 1992. (App.A1) At the time of oral argument, plaintiff tendered to the court the July 2, 1990 Memorandum Opinion of District Judge Marvin Aspen sustaining the sufficiency of the RICO allegations of the complaint filed in the companion case of *Chinnici v. Central DuPage Hospital*, docket 89 C 7752, 1990 U.S.Dist. Lexis 8164. On August 11, 1992 the Seventh Circuit issued its opinion affirming the district court's *res judicata* dismissal of plaintiff's suit and, on the basis of that dismissal, declining to reach the question of whether the allegations of the first amended compliant were sufficient to state a RICO cause of action. (App.A)

A timely petition for rehearing was filed and denied by order dated October 26, 1992. (App.B)

REASONS FOR GRANTING THE WRIT

Preliminary

Petitioner wishes to present as clean a question as possible for this Court. Accordingly, before beginning to argue the matters **in issue**, a statement of what **is not in issue** may assist.

It is undisputed that *res judicata* operates to bar the relitigation of all issues which a party had a **full and fair opportunity** to litigate. *Montana v. United States*, 440 U.S. 147, 153-4, 99 S.Ct. 970, 973 (1979) In the Seventh Circuit the "full and fair opportunity" has been construed to mean that *res judicata* will extend to bar not only issues "which were raised and decided in the earlier litigation, but also to those issues ***which could have been raised and decided*** in that litigation. *Car Carriers, Inc. v. Ford Motor Company*, 789 F.2d 589, 593 (7th Cir., 1985).

Petitioner contests only one element of the *res judicata* equation, and that only in its Seventh Circuit explication **as applied in this case**: i.e., what could have been raised and decided. Petitioner contends that:

if a Court of Appeals issues a prospective" edict-opinion" (Ezpeleta *v. Sisters of Mercy Hospital*) arrogating the authority to state, while there is a division of opinion among the Federal Circuits **and** prior to a dispositive decision by the Supreme Court, that its opinion on a matter of unsettled law precludes further challenge to the point of threat of Rule 11 sanction, and when the Supreme Court overrules that Court of Appeals on the very issue that it had attempted to foreclose by threat of sanction,

and the litigant who had withdrawn a theory of recovery in the district court in obeisance to the overruled "edict-opinion" moves before that same Court of Appeals to reinstate, or obtain remandment to reinstate, his withdrawn theory of recovery;

it follows that: Fundamental fairness and basic justice require that the Court of Appeals allow reinstatement of the withdrawn theory of recovery.

But, if instead: The Seventh Circuit Court of Appeals ignored the motion to remand, alluding in its opinion to the claim as having been abandoned; and thereafter Rule 60(b)(6) relief failed to obtain reinstatement in the district court.

It is clear that: Petitioner was afforded neither a full nor a fair an opportunity to litigate his antitrust claim in his first suit, and invocation of *res judicata* to preclude his second filing is fundamentally unfair and unjust.

I.
THE JUDICIAL POLICY UNDERLYING *RES JUDICATA* IS TO PREVENT RELITIGATION OF ISSUES AND SPLITTING OF CAUSES OF ACTION. RES JUDICATA IS NOT APPROPRIATE WHERE ITS APPLICATION FORECLOSES A VALID CAUSE OF ACTION, WITHDRAWN UNDER RULE 11 COMPULSION, FROM BEING HEARD AT ALL.

A.
Fundamental fairness is the guiding precept underlying application of the doctrine of *res judicata*. That purpose has not been served by the judgment sought to be reviewed.

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral extoppel and *res judicata*, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction...cannot be disputed in a subsequent suit between the same parties or their privies..." Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions...To preclude parties from contesting matters that they have had a **full and fair opportunity to litigate** protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana v. United States , 440 U.S. 147, 153-4, 99 S.Ct. 970 (1979) (emphasis added, citations omitted)

In discussing *res judicata* this Court has held that "the concept of claim and issue preclusion (*res judicata* in the broad sense) cannot apply when the party against whom the earlier judgment is asserted did not have a full and fair opportunity to litigate the issue in the earlier case." *Haring v. Prosise*, 462 U.S. 306, 313, 103 S.Ct. 2368, 2373 (1983) Rather, "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness or fairness of procedures followed in the prior litigation." *Kremer v. Chemical Const. Corp.*, 456 U.S. 480-81, 102 S.Ct. 1883, 1897 (1982) Even the Seventh Circuit has recognized that "while the purpose of the doctrine is to prevent a party from litigating the same issue twice, it should not be used to preclude a party from litigating the matter at all...and it must not be an injustice to apply the doctrine." *Jones v. City of Alton*, 757 F.2d 878, 884 (7th Cir., 1985)

Here, on the appeal of his first case, and after the Supreme Court had overruled the Seventh Circuit's edict-opinion in *Ezpeleta*, plaintiff moved for leave to reinstate his antitrust counts. (App.E, 7-11) That procedure was appropriate:

In the Seventh Circuit it is still possible to amend a complaint after appeal has been taken. The procedure set out by the case law is for the party seeking amendment to make the initial motion before the Court of Appeals because it is the only court with jurisdiction at that moment. **The general practice in the Seventh Circuit is to then remand the issue to the district court for resolution in its discretion pursuant to Rule 15(a).**

Memorandum opinion, *Lim v. Central DuPage Hospital* App.G, at page 10

However, in this instance, the "general practice in the Seventh Circuit" was not followed. Instead, the Seventh Circuit affirmed

dismissal of plaintiff's civil rights counts without ruling on plaintiff's motion for remandment; commenting instead that "[a]bandonment of claims is a *leitmotiv* of this appeal." 871 F.2d at 646 (App.A 5) Ironically, the Wagnerian allusion is singularly apt in light of the Fafnirian zeal with which the Seventh Circuit, intent on preserving the effect—if not the validity—of the *Ezpeleta* decision, was fending off plaintiff's efforts to tap the Rheingold of antitrust relief.

This procedure was fundamentally unfair.

B.

Withdrawal of a cause of action under threat of Rule 11 sanction is neither abandonment nor waiver.

"Waiver" has been defined as "the intentional or voluntary relinquishment of a known right". Black's Law Dictionary, Rev. 4th Ed., 1968. "Abandon" similarly implies an extant right; "abandon is defined as "1: to cease to assert or exercise an interest, **right**, or title to esp. with the intent of never again resuming or reasserting it: [syn] YIELD, RELINQUISH". Webster's Third New International Dictionary, 1976. In respect of a claim of waiver of a cause or right of action, waiver necessarily implies that the plaintiff possessed "the right to bring suit; a legal right to maintain an action, growing out of a given transaction or state of facts and based thereon." Black's Law Dictionary, id.

There is no question that when he filed his first suit plaintiff believed that he had a right to pursue an antitrust cause of action. However, two days later the Seventh Circuit issued its decision in *Ezpeleta v. Sisters of Mercy Hospital* (7th Cir. 1986) 800 F.2d 119 in which the court stated that "further antitrust challenges

to decisions regarding staff privileges under the Indiana medical peer review process may be deemed frivolous because of the clear bar of the state action doctrine as applied by this court in *Marrese*, *Doe* and the present case." 800 F.2d at 122

A review of the decisions of the Seventh Circuit made it clear that an antitrust action in a staff privileges case under then current Illinois statutory peer review procedures would not survive appeal to the Seventh Circuit. Against the imposing and recent adverse array of *Marrese v. Interqual, Inc.*, (7th Cir. 1984) 748 F.2d 373, cert. den. 105 S.Ct. 3501 (1985) and *Doe v. St. Joseph's Hospital*, (7th Cir. 1986) 788 F.2d 119 and, most recently, *Ezpeleta v. Sisters of Mercy*, op cit., only a single decision could be found permitting an antitrust action in a staff privileges setting: *Tambone v. Memorial Hospital for McHenry County* (D.C. Ill. 1985) 635 F.Supp. 508; aff'd 825 F.2d 1132 (7th Cir. 1987). However *Tambone* arose under the pre-1983 provisions of the Illinois Hospital Licensing and Medical Practice Acts which did not require reporting of adverse peer review decisions to the Illinois State Medical Disciplinary Board, a factor found significant in *Marrese*. By the time of the events that gave rise to plaintiff's first suit, the pertinent Illinois statutes had been amended to require reporting of adverse peer review decisions to the appropriate state agency. Thus, the single significant factor that distinguished the Illinois and Indiana statutory peer review systems had been eliminated prior to plaintiff's 1986 antitrust filing. Plaintiff's hope of being able to **legitimately** argue around *Marrese* and *Doe* was extinguished by the *per curiam* opinion in *Ezpeleta*.

In commenting on plaintiff's decision to withdraw his antitrust claim from his first suit, the Court of Appeals in the instant appeal stated: "In view of our warning about Rule 11 sanctions in *Ezpeleta*, it is not surprising that he chose to withdraw his

antitrust claim (**but he could have argued that the Illinois peer review system was sufficiently different from Indiana's that *Ezpeleta* was inapplicable to his case**)." (App.A 11; 972 F.2d 763), citations omitted, emphasis added.

The reasonableness of the Court of Appeals' comment, and the voluntariness of plaintiff's withdrawal of his antitrust theories, must be considered in the context of the law prevailing at the time the decision was made, including the Seventh Circuit's opinion of counsel's obligation under Rule 11. The Seventh Circuit has held that pursuit of a plausible claim in the absence of a reasonable expectation of recovery constitutes an abuse of process which "is independently tortious, and...may be the basis of substantive liability under tort (or anti-trust laws) as well as the basis for an award of fees...This theme also appears in cases emphasizing that **dogged pursuit of a colorable claim becomes actionable bad faith once the attorney learns (or should have learned) that the claim is bound to fail**." In Re TCI, Ltd. (7th Cir. 1985), 769 F.2d 441, 445, citations omitted, emphasis added.

Here, plaintiff was faced with the decision whether to withdraw his antitrust theories in February-March 1987. Seventh Circuit antitrust law was clearly adverse. Counsel did not (and still does not) see a **legitimately** arguable difference between Indiana and Illinois statutory peer review processes for purpose of antitrust jurisdiction. There was no case pending before the Supreme Court which seemed likely to offer any hope for a change in the application of the state action doctrine in staff privilege antitrust cases. (This Court did not grant *certiorari* in *Patrick v. Burget* until October 5, 1987; see 484 U.S. 814, 108 S.Ct. 65 [1987]). *Ezpeleta* hinted strongly at Rule 11 hazard in pursuing plaintiff's chosen antitrust claim. *In Re TCI, Ltd., op cit.*, was considerably more direct:

> A lawyer has a duty, which the recent amendment to Rule 11 emphasizes, **to limit litigation** to contentions "well grounded in fact and...warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Fed. R. Civ. P. 11. **If a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious.** To put this a little differently, a lawyer engages in bad faith by acting recklessly or with indifference to the law, as well as by acting in the teeth of what he knows to be the law. 769 F.2d 441, 445, citations omitted, emphasis added.

Here, the "teeth of the law" were clear and pointed: *Marrese v. Interqual., op cit., Doe v. St. Joseph's Hospital, op cit.* and—flying a Rule 11 battleflag—*Ezpeleta v. Sisters of Mercy.* There were **no** differences between the Indiana and Illinois statutory peer review provisions pertinent to an antitrust action. Could plaintiff "have argued that the Illinois peer review system was sufficiently different..."?

No; not in good faith. Not if counsel's conduct is sanctionable where "**[i]f a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious.** *In re TCI, Ltd., op cit.*, emphasis added.

Further pursuit of plaintiff's antitrust theory in the district court would have been **wrongful**; withdrawal of that theory was mandatory. (See, e.g., *Mohammed v. Union Carbide* (D.C. Mich, 1985) 606 F.Supp. 252, 261: "An attorney is obligated to dissuade his client from pursuing specious claims, and thereby avoid possible sanctions by the court, as well as unnecessary

costs of litigating a worthless claim."; see also *Van Berkel v. Fox Farm and Road Machinery* (D.C. Minn. 1984), 581 F. Supp. 1248, 1251: attorney has duty to dismiss a baseless suit, even over objection of his client, and to do so promptly when the lack of merit is learned.)

C.

Plaintiff's actions in the Court of Appeals should have sufficed to effect reinstatement of his antitrust claims.

After plaintiff had filed his main brief in his first appeal, the Supreme Court decided *Patrick v. Burget* (1988), 486 U.S. 94, 108 S.Ct. 1658. Prior to oral argument plaintiff filed a written motion seeking to reinstate his antitrust claims (See Motion to Cite Recent Authority and for Additional Procedural Relief, App.C, pp 6-9) In his motion plaintiff cited the *Patrick* decision and expressed his wish to reinstate his antitrust claims stating: "[p]laintiff wishes to reassert the anti-trust claims which had been withdrawn in the district court. Inasmuch as the antitrust claims had not been ruled upon by the district judge, those claims are not properly before this court as part of this appeal." App. C, p.8

In holding that plaintiff failed to fully pursue procedures available to him in the Court of Appeals on his first appeal, the Court of Appeals in the instant appeal stated: "Dr. Lim filed a request for remand four days before oral argument on his appeal, but he failed to respond to the defendants' arguments against remand, he failed to raise the issue during oral argument and he failed to object to our sub silentio rejection of his request for remand in our opinion when he requested rehearing of his appeal." (App.A, p.10)

In context, these purported defalcations evaporate. In his first suit, defendants had moved to dismiss on two bases: immunity from antitrust liability based on the state action doctrine as enunciated in *Ezpeleta* and precursors, and lack of a sufficient nexus to interstate commerce. (App.E, 9) Upon issuance of this Court's decision in *Patrick*, plaintiff realized that the state action immunity issue had been removed, but the issue of nexus to interstate commerce remained. Still mindful of the *Ezpeleta* admonition that "[i]n this very expensive area of litigation, we must require that attorneys think before they file" (800 F.2d at 123) plaintiff's counsel requested a 3 year audit of plaintiff's pre-suspension billings to determine the extent of interstate involvement. (App.E, 10) Upon receipt of the results, and satisfied that the results were at least arguably sufficient to support the antitrust jurisdiction, plaintiff promptly filed his motion for remandment. (App.E, 9-11) Concededly, that filing was only shortly before oral argument, but the delay was attributable to verification of the validity of the relief sought, not lethargy.

Plaintiff did not **argue** the motion at the time of oral argument of the appeal proper. Circuit Rule 27 of the Seventh Circuit Court of Appeals specifically provides that "[o]ral argument will not be heard on any motion unless ordered by the court" and no such order was issued. However, the subject of the pending motion was **raised** at oral argument and prompted the Court of Appeals, **after** oral argument, to issue a direction to defendants to file a response to the motion for remandment. The Court of Appeals direction contained no provision for reply by plaintiff. Defendants' objections to the motion for remand were filed only in response to the Court of Appeals request.

Lastly, the fact that the Court's opinion failed to make any reference to the motion for remand clearly evidenced that the

Court itself did not deem the question of reinstatement of the antitrust claims to be an issue before the Court. Indeed, it appeared that the Court of Appeals had adopted, again *sub silentio*, the defendants stated position that "[t]he only conceivable issue is whether plaintiff could now file a new antitrust complaint in a new case in the District Court, but he has not yet done so and the District Court is the proper forum to first decide this issue if and when it arises." (App.F 4)

D.

Failure to prosecute a probably futile appeal should not prejudice plaintiff's claim.

Following affirmance of the dismissal of his civil rights case, plaintiff filed a Rule 60(b)(6) motion with the district court seeking to vacate its January 22, 1988 judgment to allow reinstatement of his antitrust counts. (The instant action was filed the same day as the Rule 60(b)(6) motion in the earlier case.) The district court had available to it the full record of plaintiff's actions seeking remandment in the Court of Appeals. Nonetheless, on February 22, 1990 the court denied that motion on alternative grounds: (a) that a mere change in law is insufficient to warrant vacating a final judgment; and (b) that plaintiff failed make any effort to amend his cause on appeal. (App.G 6, 9-10)

Plaintiff filed notice of appeal. On further consideration, however, plaintiff concluded that prosecution of the appeal would be futile. The Court of Appeals had first compelled withdrawal of his chosen antitrust theory and had already turned a deaf ear to plaintiff's attempt to reinstate his antitrust claims. Plaintiff's attempts to reinstate in the Court of Appeals had been ignored in the district court's ruling on plaintiff's Rule 60(b)(6)

motion. In short, at every stage of the proceeding, plaintiff's attempts to assert an antitrust cause of action had been rejected; plaintiff was not allowed a reasonable opportunity to litigate his antitrust cause of action.

In a virtually identical situation the Seventh Circuit held that the earlier judgment did not give rise to the bar of *res judicata*. *Jones v. City of Alton*, 757 F.2d 878 (7th Cir., 1985) involved an appeal from a district court res judicata dismissal of a civil rights action brought by an African-American police officer. The plaintiff in *Jones* had been accused of improprieties and brought before the Civil Service Commission. Before the Commission Jones attempted to introduce evidence of disparate treatment in order to demonstrate racial motivation in the complain brought against him. The Commission rejected the evidence as irrelevant. On administrative review the state circuit court also held the proffered evidence to be irrelevant. The 5th District Appellate Court affirmed. Jones then filed suit in the district court alleging civil rights violations. The district court dismissed his claims as *res judicata*. The Seventh Circuit reversed holding that because plaintiff had been prevented from presenting his disparate treatment theory in the state court action, he had not been furnished a full and fair hearing. (757 F.2d at 886) The *Jones* court stated that "while the purpose of the doctrine is to prevent a party from litigating the same issue twice, it should not be used to preclude a party from litigating the matter at all...and it must not be an injustice to apply the doctrine." (757 F.2d at 885)

Here, as in *Jones*, plaintiff's every effort to advance his chosen theory was rejected by the court. In the opinion under review the Court of Appeals distinguished *Jones* on the basis that *Jones* was decided under *res judicata* principles of Illinois law and "the federal rule seems less demanding than that applied by the Illinois cases..." (972 F.2d at 763, App.A)

Petitioner respectfully submits that the underlying principle that application of *res judicata* not work an injustice is equally pervasive in both the Illinois and the Federal cases. That principle was ignored here.

E.

The district court and Court of Appeals opinions reflect a clear intent to ignore matters in the record that militate against application of res judicata.

After plaintiff's Rule 60(b)(6) motion to vacate the earlier judgment had been denied plaintiff filed a response to the *res judicata* attaching a copy of the motion for remandment that had been filed in the Court of Appeals. Plaintiff also amended the complaint to allege his efforts to seek remandment in the Court of Appeals. Plaintiff further alleged the pendency of another action, brought by Dr. Chinnici, and arising out of the same transaction. A copy of District Judge Aspen's order sustaining the civil RICO counts of Dr. Chinnici's complaint is set forth in Appendix J. Judge Aspen's order clearly evidences the substantial identity of the cases.

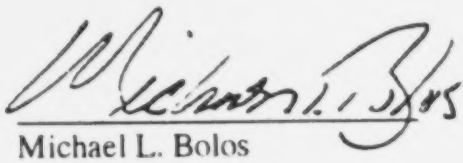
Nonetheless, no mention of the Chinnici litigation appears in any opinion of the district court or the Court of Appeals. Further, the District Court order of December 5, 1990 granting res judicata dismissal fails to acknowledge plaintiff's efforts to effect remandment even though those facts were set forth in both a written response and the body of the amended complaint. The Court of Appeals opinion states that plaintiff did not respond to the Motion to Dismiss until March 1991, even though the record clearly reflected filing of the Response on June 14, 1990 [R.66]

This is fundamentally unfair.

CONCLUSION

For all of the reasons stated, the judgment of the Circuit Court of Appeals affirming the district court's dismissal of petitioners second suit as res judicata should be reversed and remanded for trial on the merits. Further, this court should remand the case for consideration of the sufficiency of the civil RICO allegations which were not addressed by the Court of Appeals by reason of the res judicata finding in that Court.

Respectfully submitted,



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APPENDIX

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(With the exception of Appendix E, exhibits and attachments have been omitted from documents in this appendix.)

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In the
United States Court of Appeals
For the Seventh Circuit

No. 91-2981
JIT KIM LIM, M.D.

Plaintiff-Appellant,,

v.

CENTRAL DU PAGE HOSPITAL,
GEORGE HOLZHAUER, PETER BRUSCA, et. al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 89 C 7753 - **Charles P. Kocoras**, *Judge*

ARGUED MARCH 30, 1992 - DECIDED AUGUST 11, 1992

Before COFFEY, FLAUM, and KANNE, *Circuit Judges.*
COFFEY, *Circuit Judge.* For the third time, Dr. Jit Kim Lim is appealing from a denial of his claims for relief that arise from the same core of operative facts. In *Lim v. Central DuPage Hospital,* 871 F.2d 644 (7th Cir. 1989), we affirmed the district

court's ruling that Dr. Lim's claim that the hospital unlawfully revoked his staff privileges on account of race failed to state a claim upon which relief could be granted, holding that Dr. Lim did not possess a property interest in retaining staff privileges. The plaintiff thereafter filed a Federal Rule of civil Procedure 60(b)(6) motion requesting that the district judge vacate the original judgment, alleging that a change in law after the dismissal of his race discrimination claim constituted an extraordinary circumstance requiring that he be permitted to bring an antitrust claim against the defendants.[1] The district court denied the Rule 60(b) motion, holding that Dr. Lim failed to pursue the procedures available to him while his case was on appeal before us, i.e., to request an opportunity to amend his complaint to include the antitrust claims. Dr. Lim appealed the denial of his Rule 60(b) motion, and failed to file an appellate brief or a response to our order to show cause why the appeal should not be dismissed for want of prosecution. We dismissed the appeal on August 31,1990. Rather than pursue his appeal of the denial of his Rule 60(b) motion, Dr. Lim elected to attempt to litigate additional causes of action against essentially the same defendants on the basis of the identical core of operative facts asserted in his initial action. The plaintiff appeals the district court's holding that *res judicata* bars his second action. We affirm.

I. FACTS

Dr. Lim enjoyed staff privileges at Central DuPage Hospital in Winfield, Illinois as a neurosurgeon from 1976 until the suspension of his staff privileges on March 24, 1986. The plaintiff

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[1] As we explain below, Dr. Lim's initial complaint alleged an antitrust violation, but he voluntarily dismissed it to avoid Rule 11 sanction.

asserts that his suspension was the result of his association with Dr. Leonard J. Chinnici, a chiropractor, with whom he began to practice in December 1984. Dr. Lim and Dr. Chinnici agreed to refer patients to each other, to consult with each other when appropriate and to share office space at their respective offices for their practice in their joint venture, the Neuro-Spinal Center. The plaintiff's office was located in a condominium in Mona Kea Professional Park where a number of other medical doctors had their offices. The other condominium owners in the building objected to having a chiropractor practicing there and allegedly submitted the following letter to Dr. Lim on June 7, 1986:

> "We wish to convey to you our extreme displeasure with the alliance between you and Dr. Chinnici and our hope that you will take the steps to terminate this arrangement as quickly as is feasible . . . your partnership with Dr. Chinnici reflects poorly on Mona Kea Medical Park and the physicians who practice here. It is our intent to take whatever steps are necessary to discourage other chiropractors from practicing at Mona Kea.
>
> "You should also know that the Central DuPage Hospital Medical Staff and the DuPage County Medical Society have been notified of your present association with doctors of chiropractic."

The appellant maintains that during the summer of 1985 a number of the defendants warned him to terminate his association with Dr. Chinnici and that as a result of the defendants boycotting him, the number and quality of patient referrals to him decreased dramatically.

In November or December of 1985, the Medical Staff at Central

DuPage Hospital informed Dr. Lim that it was going to conduct a peer review of his medical competence because of an alleged "concern[ ] with what appeared to be disproportionate post-operative complications among Lim's patients ...." *Lim*, 871 F.2d at 647. Upon completing the peer review process, Central DuPage Hospital suspended Dr. Lim's staff privileges on March 24, 1986, and the hospital's board of governors confirmed the suspension and made it permanent on August 25, 1986. Lim asserts that he satisfactorily addressed all of the investigators' concerns, but in spite of this they suspended him as punishment for his association with a chiropractor[2] and

On August 25, 1986, the plaintiff filed an antitrust claim in the district court alleging that the initiation of the peer review process was part of a conspiracy "to ostracize and destroy plaintiff's medical practice." Two days later in *Ezpeleta v. Sisters of Mercy Health Corp.*, 800 F.2d 119, 122 (7th Cir. 1986), we stated that "any future antitrust challenges to decisions regarding staff privileges under the Indiana medical peer review process may be deemed frivolous because of the clear bar of the state action doctrine ...." When the defendants moved for dismissal of the complaint on the basis of *Ezpeleta* in February of 1987, Dr. Lim withdrew his antitrust claim and replaced it with a claim that the defendants suspended him as a result of his race, thereby violating his civil rights through illegally depriving him of a property interest in retaining his staff privileges at Central DuPage Hospital. Finding that hospital staff privileges were not "property" within the meaning of the civil rights statutes, the district court dismissed the

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[2] The plaintiff claims that he terminated his association with Dr. Chinnici on January 10, 1986, as a result of the pressures the defendants focused on him to discourage future attempts of neurosurgeons to attempt to gain a competitive advantage through an association with a chiropractor.

complaint on January 15,1988, and the plaintiff filed a timely appeal. On May 16, 1988, less than two weeks after the plaintiff filed his belated appellate brief,[3] the Supreme Court held that a hospital peer review process comprises insufficient state action to be immune from antitrust claims unless the state actively supervises and reviews the procedure. *See Patrick v. Burget*, 486 U.S. 94, 100-01, 108 S. Ct. 1658, 1662-63 (1988). *Patrick* effectively overruled our *Ezpeleta* decision, thus removing any potential bar to Dr. Lim prosecuting an antitrust claim.

On September 15, 1988, four days prior to oral argument of his appeal, the plaintiff filed a motion in this court entitled "Motion for Leave to Cite Recent Authority and for Additional Procedural Relief." In his motion the plaintiff asserted that he withdrew his antitrust claim as a result of this court's *Ezpeleta* decision, and informed the court that *Patrick* effectively overruled *Ezpeleta*. The appellant requested "leave to reinstate the anti-trust counts of this litigation and for remand thereof to the district court." In response, the defendants argued that it was too late for Dr. Lim to raise his antitrust claim on appeal because he had voluntarily abandoned it in the district court and allowed judgment to be entered against him without raising the claim there. At oral argument the appellant failed to reiterate his request for remand to reinstate his antitrust claim, and while we did not specifically address the issue in our opinion, we noted that "[a]bandonment of claims is a *leitmotif* of this appeal." *Lim*, 871 F.2d at 646. The plaintiff again failed to allude to his request

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[3]On April 25, 1988, this court issued an order to the plaintiff to show cause why his appeal should not be dismissed for failure to file a brief The appellant filed his brief on May 3, 1988, and responded to a show cause order on May 6, 1988. We note that the plaintiff likewise required an extension of time to file his reply brief. While the plaintiff is unwilling to accept the district court's judgment that his case is closed, we note that he was far from diligent in prosecuting it.

for remand to reinstate his antitrust claim in his petition for rehearing. We denied Lim's request for rehearing on May 30, 1989.

The plaintiff filed a Rule 60(b)(6) motion in the district court on October 13, 1989, arguing that the change in antitrust law under *Patrick* constituted an extraordinary circumstance requiring that the court vacate the January 22, 1988 judgment against him. On February 22, 1990, the district judge denied the Rule 60(b)(6) motion on two grounds: a) "the law is clear that a mere change in law, no matter how dramatic, is insufficient on its own to warrant vacating a final judgment [i.e., to constitute 'extraordinary circumstance']"; and b) the plaintiff failed to pursue all possible opportunities to request a remand to amend his complaint to include the antitrust claims while his appeal was pending. Dr. Lim appealed and was instructed to submit his appellate brief on or before May 7, 1990. On June 1, 1990, we issued the following order to the appellant's attorney:

> "The Clerk has brought to the attention of this Court the fact that you have failed to file appellant's brief within the required time. No motion for an extension of time within which to file appellant's brief has been made pursuant to Circuit Rule 26. On consideration whereof,
>
> "IT IS ORDERED that you, as counsel for appellant, respond within fourteen (14) days of the date of this order as to why this appeal should not be dismissed for lack of prosecution pursuant to Circuit Rule 31(c)(2)."

No response was forthcoming, and on August 31, 1990, we issued a second order:

> "Appellant failed to respond to the court's Rule to Show

> Cause issued on June 1, 1990. In that Rule to Show Cause, appellant was advised that his failure to respond to the court's order would result in the dismissal of his appeal. Accordingly,
>
> "IT IS NOW ORDERED that this appeal is DISMISSED for WANT OF PROSECUTION. *See* Circuit Rule 31(c)(2)."

While the plaintiff was defaulting on his appeal of the denial of his Rule 60(b) motion, he was busily pursuing a second lawsuit against the same defendants based on the same core of operative facts. In addition to the defendants in the first action ("Central DuPage defendants"), the plaintiff named the doctors who had offices at Mona Kea Medical Park and several professional associations as defendants ("Mona Kea defendants"), alleging that they coerced him into discontinuing his association with Dr. Chinnici. In his complaint in his second suit, Dr. Lim stated his antitrust claim and a RICO count.[4] The court issued an order on November 9, 1989, staying the second case pending resolution of the plaintiff's Rule 60(b) motion, but the action resumed after the court denied the Rule 60(b) motion on February 22, 1990. On March 29, 1990, the Central DuPage defendants filed a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted on the basis of *res judicata* and alternatively that the complaint failed to allege the essential elements of a RICO claim. The Mona Kea defendants likewise filed a Rule 12(b)(6) motion to dismiss on April 10, 1990. In the plaintiff's response to the Central DuPage defendants' motion to dismiss, he argued that *res judicata* did not bar his antitrust

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[4]The complaint also included pendant state law claims, which are not before us on this appeal.

claim because he had not received a full and fair opportunity to litigate the issue, but he acknowledged that *res judicata* barred his claim against the Central DuPage defendants on his RICO count. The district judge granted the plaintiff's motion to file an amended complaint on August 20, 1990, and ordered that the defendants' motions to dismiss were moot. Thereafter the Central DuPage defendants renewed their motion to dismiss based on *res judicata*, and the Mona Kea defendants filed an answer to the amended complaint. Dr. Lim failed to respond to the Central DuPage defendants' renewed motion to dismiss, and on December 5, 1990, the trial judge found that *res judicata* barred the claims against the Central DuPage defendants and granted their motion to dismiss. The Central DuPage defendants moved for entry of a Rule 54(b) final judgment on February 1, 1991, and the district judge ordered that the plaintiff had seven days to respond. Dr. Lim failed to object to the entry of a Rule 54(b) judgment, and the court entered judgment on March 8, 1991. On March 18, 1991, the plaintiff filed his first response to the Central DuPage defendants' September 10, 1990 motion to dismiss in a motion for rehearing and to alter or amend the judgment to reinstate his causes of action. Meanwhile, the Mona Kea defendants withdrew their answer to the amended complaint and filed a motion to dismiss on the ground of *res judicata* and the failure to adequately allege a RICO claim. On July 23, 1991, the district court denied the plaintiff's motion to alter or amend the judgment dismissing the Central DuPage defendants and granted the Mona Kea defendants' motion to dismiss. The court held that *res judicata* barred the antitrust claims against the Central DuPage defendants because the plaintiff had a full and fair procedural opportunity to litigate them; that the Mona Kea defendants were in privity with the Central DuPage defendants, and thus *res judicata* barred the claims against them; and alternatively, the court held that the plaintiff failed to allege a pattern of racketeering activity.

II. ISSUES

The only issue we consider on this appeal is whether *res judicata* bars the plaintiff from asserting his antitrust claim. The appellant agrees that *res judicata* bars him from pursuing a RICO claim against the Central DuPage defendants, and since he has failed to argue that the district court erred in holding that the Mona Kea defendants were in privity with the Central DuPage defendants, we need not address the RICO arguments.

III. *RES JUDICATA*

The appellant argues that our *Ezpeleta* decision forced him to withdraw his preferred antitrust theory, and therefore, he was denied a full and fair opportunity to litigate that issue in his first action. "For *res judicata* to apply, three requirements must be met: (1) an identity of the parties or their privies; (2) an identity of the causes of actions; and (3) a final judgment on the merits." *In re Energy Cooperative, Inc., 814* F.2d 1226, 1230 (7th Cir. 1987 The first requirement is clearly met because Dr. Lim has brought his second lawsuit against the same defendants as those involved in the initial suit, and he has failed to appeal the district court's holding that the additional defendants are in privity with the original ones. In regard to

> "the scope of [the] 'cause of action,' this circuit has utilized the 'same transaction' test. Under this test, a 'cause of action' consists of 'a single core of operative facts which give rise to a remedy.' This 'same transaction' test is decidedly fact-oriented. Once a transaction has caused injury, all claims arising from that transaction must be brought in one suit or be lost. Thus, 'a mere change in the legal theory does not create a new cause of

> action.' Therefore, prior litigation acts as a bar not only to those issues which were raised and decided in the earlier litigation but also to those issues which *could* have been raised in that litigation."

Car carriers Inc. v. Ford Motor Co., 789 F.2d 589, 593 (7th Cir. 1986) (emphasis original) (citations omitted). Since both of Dr. Lim's actions are based on the identical core of operative facts and the same injury, there is an identity of the causes of action. In regard to the third requirement for applying *res judicata*, the appellant has never disputed the fact that there was a final judgment on the initial lawsuit.

The plaintiff does not take issue with the foregoing description of *res judicata*, but contends that the policy reasons behind *res judicata* do not justify applying it in this case where he was allegedly prevented from bringing his preferred cause of action in the former suit. He quotes *Jones v. City of Alton*, 757 F.2d 878, 885 (7th Cir. 1985), for the proposition that *res judicata* "does not bar litigation of issues which could not have been litigated" in the prior action. Dr. Lim's reliance upon *Jones is* misplaced. Initially, we note that *Jones* was decided under the *res judicata* principles of Illinois law. "Because the prior litigation was brought in federal court, the federal rule of *res judicata* determines whether the [former] suit bars [Lim] from maintaining this action." *In re Energy Cooperative*, 814 F.2d at 1230. As we recognized in *In re Energy Cooperative*, "the federal rule seems less demanding than that applied by the Illinois cases ...." *Id.* "Once a transaction has caused injury, all claims arising from that transaction must be brought in one suit or lost." *Id.* (quoting *Car Carriers*, 789 F.2d at 593). Dr. Lim has failed to demonstrate that a change in law after the entry of judgment creates an exception to the application of federal *res judicata* law.

The second reason that Dr. Lim's reliance upon *Jones* to exclude the application of *res judicata is* in vain is that he was not prevented from litigating the antitrust claim in the former suit. In view of our warning about Rule 11 sanctions in *Ezpeleta,* it is not surprising that the plaintiff chose to withdraw his antitrust claim (but he could have argued that the Illinois peer review system was sufficiently different from Indiana's that *Ezpeleta* was inapplicable to his case). Nonetheless, the plaintiff failed to take advantage of his full and fair opportunity to litigate the antitrust claims after the Supreme Court released its opinion in *Patrick v. Burget.* The requirement that a party have a full and fair opportunity to litigate an issue before *res judicata* may apply relates to the procedural opportunity rather than to a judicial determination of the merits of the issue. *See Kremer v. Chemical Constr. Corp.,* 456 U.S. 461, 481, 102 S. Ct. 1883, 1897(1982). Dr. Lim filed a request for remand four days before oral argument on his appeal, but he failed to respond to the defendants' arguments against remand, he failed to raise the issue during oral argument, and he failed to object to our *sub silentio* rejection of his request for remand in our opinion when he requested rehearing of his appeal. After failing to zealously pursue the procedures available to him in the appellate court, the plaintiff possessed still one more opportunity to attempt to reinstate his antitrust claims through his Rule 60(b)(6) motion. The appellant filed his Rule 60(b)(6) motion requesting that the judgment be vacated, but when the district court denied the motion, he failed to properly prosecute an appeal. Although he filed his appeal, he failed to submit an appellate brief, thus resulting in our dismissal of his appeal for failure to prosecute it. In defaulting on his Rule 60(b)(6) appeal, the plaintiff failed to pursue the "full and fair opportunity" to litigate his available antitrust claim. Just as abandonment of claims was the motif of

Dr. Lim's first appeal, *see Lim*, 871 F.2d at 646, failure to follow through with the procedures he initiated is the motif of this third appeal. The plaintiff received a full and fair opportunity to litigate his antitrust claim, but neglected to prosecute the same in a lawyer-like timely and efficient manner.

IV. CONCLUSION

At some point, there must be an end to litigation, and barring the appellant's second suit on the ground of *res judicata is* an equitable method of upholding that policy. As the district court noted, "[t]he plaintiff has filed two cases, five separate complaints, two appeals [now three], and numerous motions to reconsider and/or vacate. At some point it is unfair to require the defendants to repeatedly renew their defense in a case which they reasonably believed to be closed against them." Dr. Lim's inability to litigate his antitrust claim is the result not of a deprivation of available process, but of his counsel's failure to follow through with the full and fair opportunity that was available to him. The judgment of the district court is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 26, 1992

Before
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

JIT KIM LIM, Plaintiff-Appellant,	] Appeal from the United] States District Court for] the Northern district of
No. 91-2981	] Illinois, Eastern
v.	] Division
CENTRAL DUPAGE HOSPITAL, a corporation, GEORGE HOLZHAUER, PETER BRUSCA, et. al., Defendants-Appellees.	] No. 89 C 7753] Charles P. Kocoras,] Judge.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiff-appellant, all of the judges on the original panel having voted to deny the same,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Appendix C-1

United States District Court
Northern District of Illinois
Eastern Division

No. 89-C7753

JIT KIM LIM, M.D.

Plaintiff,

v.

CENTRAL DU PAGE HOSPITAL, et al.,

Defendants.

Hon. Charles P. Kocoras

FIRST AMENDED COMPLAINT

PLAINTIFF JIT KIM LIM, M.D. by his attorneys brings this action against all defendants for damages for violations of the anti-trust laws of the United States (Title 15, U.S. Code), for tortious interference with prospective advantage, for tortious interference with contractual relations and, as to some defendants, for violations of the racketeering laws of the United States (Title 18, U.S. Code), demands a trial by jury and alleges as follows:

THE PARTIES

A. Plaintiff JIT KIM LIM, M.D. resides in Oak Brook, Illinois and is a board certified neurosurgeon licensed as a physician and in good standing with the State of Illinois.

B. Defendant CENTRAL DU PAGE HOSPITAL is a corporation with its principle place of business at 25 North Winfield Road, Winfield, DuPage County, Illinois; defendant HEALTHCORP AFFILIATES is the parent/managing corporation of CENTRAL DU PAGE HOSPITAL; defendants GEORGE HOLZHAUER, DAVID FOX AND WENDELL FINKBEINER were, at all times complained of, principal administrators of defendant CENTRAL DU PAGE HOSPITAL.

C. Defendants PETER BRUSCA, M.D., RAYMOND DIETER, M.D., DAVID BARRETT M.D., MUHAMMAD SHARIF, M.D., ROBERT WILSON, M.D., ANGELO SORCE, M.D., DONALD WHITE, M.D., WILLIAM PETRANDO, M.D., JEFFREY JOHNSON, M.D., DENNIS BAKER, M.D., JAMES

O'BRIEN, M.D., VINCENT SACKETT, M.D., RENATO IMANA, M.D., HARB BOURY, M.D., DOUGLAS B. MAINS, M.D., RONALD M. SEVERINO, M.D., J. GEORGE HANDLEY, M.D., RICHARD MEYER, M.D., NEIL AGRUSS, M.D., and RICHARD NIEDBALLA, M.D., were at the time of the matters herein complained of physicians holding staff privileges at CENTRAL DU PAGE HOSPITAL; at the time of the matters alleged herein these defendants were members of the medical executive committee of the medical staff of CENTRAL DU PAGE HOSPITAL.

D. Defendants J. GEORGE HANDLEY, M.D., RENATO IMANA, M.D. and HARB BOURY, M.D. are medical physicians specializing in neurosurgery and holding staff privileges at CENTRAL DU PAGE HOSPITAL; Defendant RENATO IMANA, M.D. was at the time of the matters alleged herein a member of the surgical ad hoc committee of the medical staff of CENTRAL DU PAGE HOSPITAL.

E. Defendants PETER BRUSCA, M.D., DOUGLAS B. MAINS, M.D., RONALD SEVERINO, M.D., MUHAMMAD SHARIF, M.D., DENNIS BAKER M.D., JAMES GRISSOM, M.D., DONALD GUSTAFSON, M.D., RICHARD NIEDBALLA, M.D. and RICHARD MEYER, M.D. were medical physicians who owned office condominia in the Mona Kea Medical Park; Defendants MONA KEA SOUTH ENTERPRISES, INC., a corp., MONA KEA LEASING ASSOCIATION, a corp., and CENTRAL DU PAGE HOSPITAL were corporate owners of office condominia at Mona Kea Medical Park.

F. Defendants MONA KEA OWNERS ASSOCIATION, a corp. and MONA KEA SOUTH PROFESSIONAL CONDOMINIUM ASSOCIATION, a corp. were Illinois corporations whose officers, shareholders and directors were owners of office condominia located in the Mona Kea Medical Park; at the time of the matters herein complained of Defendant DOUGLAS B. MAINS, M.D. was president of the MONA KEA OWNERS ASSOCIATION, a corp. and Defendant RONALD M. SEVERINO, M.D. was president of the MONA KEA SOUTH PROFESSIONAL CONDOMINIUM ASSOCIATION, a corp.; Defendants DOUGLAS B. MAINS, M.D., RONALD SEVERINO, M.D. and RICHARD DOMINGUEZ, M.D. were, at the time of the matters herein complained of, acting managers of the MONA KEA SOUTH PROFESSIONAL CONDOMINIUM ASSOCIATION, a corp.

G. On information and belief plaintiff alleges that each of the above named physician defendants were members of the medical staff of CENTRAL DU PAGE HOSPITAL which comprises approximately 240 medical physicians who are authorized to practice medicine at that hospital.

H. On information and belief plaintiff further alleges that all physician defendants were members of the American Medical Association during all or part of the period 1966 through 1986 inclusive.

I. On information and belief plaintiff further alleges that all individual physician defendants were members of the DuPage County Medical Society during all or part of the period 1966 through 1986.

Appendix C-5

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1337 and Sections 4 and 16 of the Clayton Act (15 U.S.C., Sections 15 and 26) vesting the district court with jurisdiction to award damages and to grant relief for violations of the anti-trust laws of the United States. As hereinafter set forth, this controversy involves violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. Section 1-2). Jurisdiction of this court as to some defendants is also invoked under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. Section 1961, et. seq. vesting the district court with jurisdiction to award damages and to grant relief for violations of RICO. This court also has jurisdictions of claims brought under state law by virtue of the doctrine of pendent jurisdiction in that such claims arise from a common nucleus of operative facts with the federal claims herein alleged and are so intertwined as to make the courts' exercise of jurisdiction appropriate.

DEFENDANTS' EXTORTIONATE SCHEMES

1. On or about December, 1984 plaintiff formed a business relationship with Leonard Chinnici, a chiropractic physician (hereinafter Dr. Chinnici or the chiropractor) pursuant to which the parties agreed to practice together under the name of "The Neuro-Spinal Center". The parties agreed to refer patients to each other when appropriate and in the best interest of the plaintiff; to cross-consult with each other when appropriate; and to share office space at their respective offices for their respective professional uses. Dr. Lim's office was in a unit that he owned at 511B Thornhill, Mona Kea Professional Park.

2. On March 1, 1985, plaintiff entered into an agreement with Dr. Chinnici that provided, among other things, that the parties would share the use of their respective offices for their respective professional uses solely in connection with the business formed as The Neuro-Spinal Center.

3. Throughout the summer months of 1985, defendant SEVERINO and other members of MONA KEA and the CENTRAL DUPAGE HOSPITAL staff, acting on behalf of themselves, CENTRAL DUPAGE HOSPITAL and MONA KEA told Dr. Lim that it would be in his best interests to terminate his association with Dr. Chinnici and that no good could come to him from association with a chiropractor.

4. On April 5, 1985, in response to Dr. Chinnici's treatment of patients at Dr. Lim's MONA KEA facility, Defendant MAINS, as president of MONA KEA OWNERS ASSOCIATION, called a special meeting of the association for April 17, 1985 regarding "Chiropractic Occupancy at Mona Kea" for all of the condominium unit owners. A copy of the notice is attached as Exhibit B.

5. Subsequent, on April 9, 1985 MONA KEA SOUTH PROFESSIONAL CONDOMINIUM ASSOCIATION, by RONALD SEVERINO, M.D., sent a "Notice of Declaration of Condominium Ownership...Demand to Cease and Desist Violation" to Dr. Lim and Ursula Lim. The notice claimed that Dr. Lim used their condominium unit for the "administration, consultation or performance of chiropractic services" in violation of the

Declaration of Condominium Ownership dated May 4, 1979. A copy of the Notice is attached as Exhibit C.

6. At the April 17, 1985 special meeting, MONA KEA's members, one of which is CENTRAL DU PAGE HOSPITAL, "confirmed" the action taken by its officers in sending the notice dated April 9, 1985. A copy of the minutes of that meeting is attached as Exhibit D. In response to the notice Dr. Lim stated that chiropractors are licensed professionals, by the State of Illinois and therefore he was not in violation of the Declarations. Dr. Lim further explained that there were other non-medical tenants including electrolysis, law offices in MONA KEA. Not withstanding Dr. Lim's explanation, Defendants PETER BRUSCA, M.D., DOUGLAS MAINS, M.D., RONALD SEVERINO, M.D. and JAMES GRISSOM, M.D., together with other individuals, voted to confirm issuance of the Cease and Desist Notice.

7. During the period of Dr. Chinnici's association with Dr. Lim. Defendants MAINS and SEVERINO commuted or caused the communication of such association to be communicated to defendants BOURY, HANDLEY and IMANA and, pursuant to such communication, defendants MAINS, SEVERINO, BOURY, HANDLEY and IMANA conspired and agreed among themselves and undertook to spread rumors among the medical staff of CENTRAL DU PAGE HOSPITAL disparaging Dr. Lim's professional competency and ethics for the purpose of engendering animosity against Dr. Lim and thereby intimidating and coercing Dr. Lim into relinquishing his association with Dr. Chinnici.

8. Subsequently, on or about May, 1985, certain members of the CENTRAL DU PAGE HOSPITAL medical staff prominently posted an advertisement of The Neuro-Spinal Center in a derogatory fashion on a bulletin board in the staff lounge at CENTRAL DU PAGE HOSPITAL for the purpose of suggesting professional impropriety and unethical acquisition of patients by Dr. Lim by virtue of his association with Dr. Chinnici.

9. On June 7, 1985 defendant MAINS as president of MONA KEA OWNERS ASSOCIATION and SEVERINO as president of MONA KEA SOUTH PROFESSIONAL CONDOMINIUM ASSOCIATION, wrote to the plaintiff advising him that subsequent to the April 17, 1985 meeting "All Mona Kea condominium owners were surveyed" concerning chiropractic occupancy. The letter further stated:

> We wish to convey to you our extreme displeasure with the alliance between you and Dr. Chinnici and our hope that you will take the steps to terminate this arrangement as quickly as is feasible . . . your partnership with Dr. Chinnici reflects poorly on Mona Kea Medical Park and the physicians who practice here. It is our intent to take whatever steps are necessary to discourage other chiropractors from practicing at Mona Kea. You should also know that the Central DuPage Hospital Medical Staff and the DuPage County Medical Society have been notified of your present association with

doctors of chiropractic. (Exhibit E, emphasis added.)

10. Pursuant to the "survey" alleged in paragraph 9 next preceding, and acting on behalf of the MONA KEA CONDOMINIUM owners, including defendants herein, defendant SEVERINO, M.D. as president of the MONA KEA SOUTH PROFESSIONAL CONDOMINIUM ASSOCIATION circulated a memorandum dated September, 1985 proposing an amendment to the Declaration of Condominium Ownership which would expressly prohibit ownership, rental or occupancy by chiropractic physicians. (See Exhibit F, constituting the September 10 memorandum and proposed amendment). On September 26, 1985 the amendment was adopted by votes of defendant RONALD SEVERINO, M.D., RICHARD DOMINGUEZ, M.D., DOUGLAS MAINS, M.D., PETER BRUSCA, M.D., CENTRAL DU PAGE HOSPITAL by WENDELL FINKBEINER, vice president, MONA KEA SOUTH ENTERPRISES, INC. by DOUGLAS B. MAINS, M.D., MONA KEA LEASING ASSOCIATION by RONALD SEVERINO, M.D. and DONALD GUSTAFSON, M.D., each of whom, by so doing, ratified and affirmed the prior actions taken against Dr. Lim by reason of his association with Dr. Chinnici. Further as set forth both in the Articles of Condominium Ownership and the September 10 memorandum, the defendants voting in favor of the amendment knew that such amendment would become effective only upon recordation with the Recorder of Deeds, contemplated and intended that the same would be recorded with the Recorder of Deeds and expressly authorized and directed that the same be filed

with the Recorder of Deeds, which event occurred October 14, 1985. (See Exhibit F).

11. Immediately following the amendment of the Declaration of Condominium Ownership, and as a consequence of a professional boycott by the individuals comprising the CENTRAL DU PAGE HOSPITAL medical staff, MONA KEA Owners and CENTRAL DU PAGE HOSPITAL, the number and quality of patient referrals to Dr. Lim from the members of the CENTRAL DU PAGE HOSPITAL medical staff drastically decreased.

12. On November 1, 1985 Dr. Chinnici employed two additional chiropractic physicians in Dr. Lim's office at MONA KEA. (See Exhibit G).

13. On November 7, 1985 the surgical audit committee of the CENTRAL DU PAGE HOSPITAL medical staff informed plaintiff of the initiation of an audit of plaintiff's neurosurgical cases. (See Exhibit H). During the period from January through March, 1986 the surgical ad hoc committee performed an extensive audit of Dr. Lim's patients. In the course of the audit certain irregularities were cited each of which was satisfactorily addressed by Dr. Lim.

14. On January 10, 1986, in an effort to escape from the dogged and escalating pressures being brought to bear on him by and on Behalf of defendants by reason of plaintiff's association with Dr. Chinnici, plaintiff through his then counsel wrote Dr. Chinnici terminating the Lim-Chinnici agreement dated March 1, 1985. By reason of termination of that agreement plaintiff lost the benefit of his professional association with Dr. Chinnici

and was restricted and impaired in the free and lawful professional use of his office condominium at MONA KEA. A copy of that letter is attached as Exhibit

15. Although plaintiff had been on the medical staff or CENTRAL DU PAGE HOSPITAL for some ten years prior to the initiation of the audit without imposition of any sanction or any limitation or restriction on the scope of his neurosurgical admitting and operating privileges, as a result of and in fortherance of the conspiracy against plaintiff and Dr. Chinnici, defendants BRUSCA, M.D., DIETER, M.D., BARRETT, M.D., SHARIF, M.D., WILSON, M.D., SORCE, M.D., WHITE, M.D., PETRANDA, M.D., JOHNSON, M.D., BAKER, M.D., O'BRIEN, M.D., SACKETT, M.D., NIEDBALLA, M.D., MEYER, M.D. and AGRUSS, M.D. acting as the medical executive committee of the CENTRAL DU PAGE HOSPITAL medical staff summarily suspended Dr. Lim's staff privileges effective March 24, 1986.

16. On August 25, 1986 the Board of Governors of CENTRAL DU PAGE HOSPITAL, including defendants HEITZLER, M.D. and NEIDBALLA, M.D., voted to confirm and make permanent the suspension of plaintiff's privileges.

PRIOR AND PENDING LITIGATION AMONG THE PARTIES

17. On August 25, 1986 plaintiff filed an action in the United States District Court, Northern District of Illinois, Eastern Division bearing suit No. 86 C 6333 and naming as parties defendant CENTRAL DU PAGE

HOSPITAL, a corp., HEALTHCORP AFFILIATES a corp., DAVID FOX, GEORGE HOLZHAUER, PETER BRUSCA, M.D., RAYMOND DIETER, M.D., DAVID BARRETT, M.D., MUHAMMAD SHARIF, M.D., ROBERT WILSON, M.D., ANGELO SORCE, M.D., DONALD WHITE, M.D., WILLIAM PETRANDO, M.D., JEFEREY JOHNSON, M.D., DENNIS BAKER, M.D., JAMES O'BRIEN, M.D., VINCENT SACKETT, M.D., RENATO IMANA, M.D. HARB BOURY, M.D., DOUGLAS B. MAINS, M.D., RONALD B. SEVERINO, M.D. J. GEORGE HANDLEY, M.D. RICHARD NIEDBALLA, M.D., RICHARD MEYER, M.D., NEIL AGRUSS, M.D. As originally filed 86 C 6333 sought monetary damages and other relief by reason of the named defendants' alleged violations of the Clayton Act. The action also asserted pendent state law claims.

Shortly after 86 C 6333 was filed the 7th Circuit issued its decision in Ezpeleta v. Sisters of Mercy, 800 F. 2d 112 (7th Circuit 1986). Ezpeleta effectively precluded invocation of anti-trust claim in "peer review" cases.

18. Cognizant of the stare decisis effect of Ezpeleta and mindful of the threat of sanctions explicit in the Ezpeleta opinion, plaintiff reluctantly withdrew his anti-trust counts and filed a Second Amended Complaint alleging violations of 42 U.S.C. 1981, 1982 and 1985.

19. In January, 1988 the district court dismissed plaintiff's complaint which then contained only civil rights and pendent state law claims.

20. Plaintiff appealed the district court decision and during the pendency of that appeal, but after the filing of plaintiff's main brief on appeal, the Supreme Court issued its opinion in Patrick v. Burget, 108 S. Court 1658 (1988) which impliedly overruled the 7th Circuit's decision in Ezpeleta. Plaintiff filed a motion with the 7th Circuit citing the Patrick decision and requesting remandment for reinstatement of the anti-trust counts of the Complaint.

21. In March, 1989 the 7th Circuit affirmed the District Court's dismissal of the civil rights counts without ruling on the question of remandment.

22. On October 13, 1989 Dr. Leonard J. Chinnici, the chiropractor with whom plaintiff had been associated, filed an action in the United States District Court bearing suit No. 89 C 7752 and naming as defendants Central DuPage Hospital, Mona Kea South Professional Condominium Association, Mona Kea Owners Association, Peter Brusca, M.D. Raymond Dieter, M.D., David Barrett, M.D., Muhammad Sharif, M.D., Robert Wilson, M.D., Angelo Sorce, M.D., Donald White, M.D., William Petrando, M.D., Jeffrey Johnson, M.D., Dennis Baker, M.D., James O'Brien, M.D., Vincent Sacket, M.D., Richard Niedballa, M.D., Richard Meyer, M.D. , Neil Agruss, M.D., J. George Handley, M.D., Renato Imana, M.D., Harb Boury, M.D., Douglas B. Mains, M.D., Ronald Severino, M.D., Richard Doninguez, M.D. and the unknown individuals who were the directors Central DuPage Hospital on the relevant dates. Dr. Chinicci's action is pending before the Honorable Marvin E. Aspen and asserts causes of

action under the Racketeer Influenced and Corrupt Organizations Act, the Clayton and Sherman Acts, and pendent State Court claims for tortious conduct.

22a. On October 13, 1989 plaintiff filed the instant action.

23. Also on October 13, 1989 plaintiff filed a motion pursuant to Rule 60B to set aside the judgment in 86 C 6333, which motion was denied by the Honorable Charles P. Kocoras on February 22, 1990.

AN ILLEGAL ENTERPRISE IN INTERSTATE COMMERCE AND DEFENDANTS' INVOLVEMENT WITH AND FURTHERANCE OF SUCH ILLEGAL ENTERPRISE

24. Commencing on November 22-23, 1963 the American Medical Association (AMA) instituted an illegal enterprise that had as its goal the destruction of the profession of chiropractic in the United States. Sequentially, the AMA enlisted its members (1966) and then the hospitals dominated by its members were subject to its ethics standards and, at various times, the AMA's state, county, affiliated societies, and their members in the illegal enterprise. The enterprise was national in scope involving all 50 states. The illegal enterprise included a comprehensive boycott of doctors of chiropractic by medical physicians and physician dominated hospitals involving extortion of participants by purported codes of ethics, interpretations thereof, and other means. In particular, the district court for the Northern District of Illinois Eastern Division found that members based their actions on the premises that it was

unethical for a medical physician to associate with chiropractors. Wilk, et. al. v. AMA, et. al., 671 F. Supp. 1465 at 1470 (Northern District of Illinois 1987; the conduct in question eggregious enough that Judge Getzendanner branded it as "lawlessness". 671 F. Supp. at 1488)

24a. The members of the DuPage County Medical Society, the members of the medical staff at Central DuPage Hospital, and the other corporate and individual defendants became a part of the AMA originated illegal enterprise. Central DuPage Hospital entered the illegal interstate enterprise by agreeing with its medical staff to participate in the lawlessness of the enterprise which it first did by agreeing to bar all association with chiropractors by it or the medical physicians staff members of the hospital. In 1981 the medical staff and directors of Central DuPage Hospital, acting in furtherance of the illegal enterprise, promulgated the continuing boycott policy regarding doctors of chiropractic which is attached hereto as Exhibit I Paragraph 4 of Exhibit I confirms that Central DuPage Hospital joined the enterprise by instituting an unlawful restriction prohibiting medical physicians from associating with chiropractors. Paragraph 4 of the policy reads:

> By providing access to hospital diagnostic facilities for chiropractic doctors, hospital based physicians are placed in a position of professional association with such chiropractors, and this is not in the best interest of patient care. (Specific reference is made to the problem

of reporting results of consultations with chiropractors

The medical staff, its executive committee, and the board of directors of Central DuPage Hospital reaffirmed their participation in the illegal enterprise on November 28, 1983 by ratification of the policy set forth in Exhibit I.

25. Defendants are each associated with that interstate enterprise, a group of individuals and corporations associated in fact, the same being an "enterprise" within the meaning of 18 U.S.C. Section 1961 (4) and 1962 (c) which engaged in, or the activities of which affect, interstate commerce within the meaning of 18 U.S.C. Section 1962 (c), (which is more fully described in paragraphs

On information and belief, the enterprise has functioned at least since 1963 and has sought to restrict the public's access to the chiropractic profession both by austricism of chiropractors by medical physicians and by intimidation and coercion of medical physicians who wish to associate with chiropractors, all as exemplified by Exhibit I.

26. Subsequent to 1966, the American Medical Association and the DuPage County Medical Society, each of the individual defendants then licensed and members of the AMA and DCMS, and the corporate defendants actively participated in a nationwide inter state program of extortion through such means as purported ethical pronouncements, threats of loss of hospital privileges, referrals, consultations, and other economic means, to

force medical physicians, hospitals and professional centers to participate in a "lengthy, systematic, successful, and unlawful boycott" of licensed doctors of chiropractic in order to eliminate the profession of chiropracti in all 50 states where chiropractic is licensed. Nos. 87-2672 and 87-2777 (7th Circuit 1990, slip opinion at 35) "A primary method to achieve this goal was to make it unethical for medical physicians to professionally associate with chiropractors. (Wilk, supra, at 3-41).

27. The purpose of the interstate scheme of extortion and boycott was

> "To prevent medical physicians from referring patients to chiropractors; from accepting referrals of patients from chiropractors; to prevent chiropractors from obtaining access to hospital diagnostic services and membership on hospital medical staffs; to prevent medical physicians from teaching at chiropractic colleges or engaging in any joint research, and to prevent any cooperation between the two groups in the delivery of health care services." (Wilk, fn.1, supra at page 4)

28. At least during the period 1966 through 1986, each defendant participated in this illegal enterprise (by two or more extortionate acts) by instituting rules, coercing other medical physicians and institutions, and otherwise extorting each other, the institutional defendants, and an unknown number of other chiropractic and medical physicians to deny all advantageous economic benefits to those who would otherwise legally engage in profes-

sional association or cooperation between doctors of medicine and doctors of chiropractic.

29. On information and belief, plaintiff alleges that these prohibitions on association and cooperation were made known in the form of policy manuals; declarations of membership; subscription to codes of ethics; association rules; discussion groups; trade publications; and in other ways. These prohibitions coerced Central DuPage Hospital Association, Mona Kea and Mona Kea South Professional Condominium Association, the Mona Kea Owners Association and the individual defendants to coerce each other and third parties to avoid or surrender otherwise legal and economically beneficial association or cooperation between medical doctors and doctors of chiropractic. Such coercive acts and furtherance of the illegal interstate enterprise occurred on numerous occasions during each of the years prior to the extortionate acts complained of herein.

30. The illegal interstate enterprise continued to extort medical physicians, hospitals and others through, for example, such printed policies of the medical staff of defendant Central DuPage Hospital as are illustrated in Exhibit I hereto which, on information and belief, was formally joined in and adhered to by all of the defendants at least until November, 1988.

31. The continuation of the enterprise is further demonstrated by the previously described actions of the condominium owners and board directors at Mona Kea, of which the medical physician defendants among them are members of the medical staff of Central DuPage Hospital.

Appendix C-19

COUNT I:

ANTITRUST VIOLATIONS CONSTITUTING A CONSPIRACY IN UNREASONABLE RESTRAINT OF COMPETITION

32. There is a relevant economic market for the providing of health care and healing services to patients with neuromuscular skeletal ailments.

33. There is a relevant geographic market within which health care and healing services are provided to patients with neuromuscular skeletal ailments which is comprised of the geographic area serviced by Central DuPage Hospital.

34. Plaintiff and Dr. Chinnici operating as the "Neuro-Spinal Center" commenced engaging in the business of providing neuromuscularskeletal services to patients in the area served by Central DuPage Hospital and its staff physicians in December, 1984. That geographic area is also served by physicians with offices in Mona Kea, many of whom are also on the staff of Central DuPage Hospital. As such, plaintiff and Dr. Chinnici were in competition with medical doctors for the providing of neuro muscularskeletal services in that relevant geographic market.

35. In providing neuromuscularskeletal services in the relevant geographic market, plaintiff and Dr. Chinnici purchased equipment and supplies in interstate commerce; sent bills to and received fees from out of state third party payers, including insurance companies

and Medicare-Medicaid funds from the United States government; and treated out of state patients, videlicet:

a. In the year preceding March 24, 1986, in excess of $125,000 of Dr. Lim's gross earnings from his profession was derived from billings for services rendered to patients admitted by Dr. Lim to Central DuPage Hospital, payment for which was made by medical insurance carriers outside the State of Illinois and from payments by federal and federally funded health insurance providers such as Medicare, Medicaid and Social Security;

b. Defendant Central DuPage Hospital derives approximately 40% of its annual revenues from out of state insurance carriers and federal or federally funded health insurance programs, such as Medicare and Medicaid; the plaintiff does not know the exact amount of such revenues but believes that the same are substantially in excess of $1,500,000.00 annually; additionally, defendant Central DuPage Hospital purchases services, supplies, goods and materials from out of state sources and suppliers in an amount in excess of $1,000,000.00 per year;

c. In the calendar year 1985, Dr. Lim aditted approximately 100 surgical cases to defendant Central DuPage Hospital, which admissions generated an average hospital bill in excess of $5,000.00 each or $500,000.00 in the aggregate;

d. At least $200,000.00 of the $500,000.00 in hospital billings attributable to Dr. Lim's patient admissions at Central DuPage Hospital represents the value of services, supplies, goods, and materials purchased from out of state sources and suppliers and utilized, directly or indirectly, in connection with such admissions;

e. Defendants Mona Kea and the constituent members and tenants constitute in excess of 50 practicing physicians whose combined interstate and out of state revenues and purchases substantially exceed $1,000,000.00 per year;

f. During the short period in which Dr. Chinnici operated his medical office at Mona Kea, he received 23% of his fees from out of state third party payors at an annual rate in excess of $26,000, representing payment for approximately 22% of his patients, at least one of whom resided out of state.

36. In addition to the fact that the illegal enterprise detailed in paragraphs 24 through 31 was interstate in character (involving all 50 states) defendants' unlawful acts alleged herein had a substantial and adverse effect on the interstate commerce engaged in by plaintiff and Dr. Chinnici.

37. The medical doctor members of the Mona Kea Condominium Association conspired among themselves and through Mona Kea and Central DuPage Hospital to prevent plaintiff and Dr. Chinnici from offering or expanding the unique competitively advantageous

services that combined chiropractic and alopathic services in treating patients with neuromuscularskeletal ailments. In furtherance of that conspiracy, defendants, among other things, wrongfully advised Dr. Lim that it was contrary to the by-laws of the Condominium Association for a chiropractor to provide services on the premises of Mona Kea; amended the by-laws of the Condominium Association to specifically state that chiropractors were excluded from and unable to provide services on the premises of Mona Kea; conspired with and through Central DuPage Hospital and certain members of its medical staff to threaten Dr. Lim with loss of his hospital staff privileges if he continued to professionally associate with Dr. Chinnici; boycotted Dr. Lim by refusing to refer patients to him because of his association with a chiropractor. All of the foregoing was done for the purpose and with the effect of forcing Dr. Lim to terminate his relationship with Dr. Chinnici thereby destroying the unique and competitively advantageous method of competition which was being undertaken by plaintiff and Dr. Chinnici through the Neuro-Spinal Center.

38. One of the co-conspirators in the anti-competitive and exclusionary conspiracy entered into by the members of the Mona Kea Condominium Association was Central DuPage Hospital which, as a corporate entity, owned a condominium at Mona Kea and actively participated as a condominium owner in the conspiracy to drive the Neuro-Spinal Center out of business and preclude this form of competitive service from being offered in the relevant market.

39. The members of the medical staff of Central DuPage Hospital, the members of the executive committee of that medical staff, the members of the board of directors of Central DuPage Hospital, and the hospital itself, had previously conspired to unreasonably injure competition from chiropractors and/or medical physicians associated with chiropractors by adopting the following policy:

> Upon recommendation of the executive committee of the medical staff, the board of directors on 8-24-81 adopted a policy not permitting access to physical therapy, occupational therapy, laboratory and x-ray facilities at Central DuPage Hospital by chiropractors, based upon the following reasons:... (See Exhibit I)

40. Central DuPage Hospital, its medical staff, executive committee and directors all participated in the illegal conspiracy formed by members of Mona Kea by conspiring to coerce Dr. Lim to terminate his relationship with Dr. Chinnici; by conspiring to punish Dr. Lim for having professionally associated with a chiropractor; and by conspiring and effecting the deprivation of Dr. Lim of his staff privileges for having done so.

41. Central DuPage Hospital was and is the largest inpatient facility in the relevant geographic market and is an economically dominant facility within that market. This is particularly true with regard to treatment of and facilities for the treatment of neuromuscularskeletal ailments that sometimes require neurological surgery.

42. Providing treatment of neuromuscularskeletal ailments by combining, in close association, the services of a neurologic surgeon with the services of a chiropractor is a competitively advantageous and superior method of doing business in that it provides the consumer with more treatment options and more convenient comprehensive and superior services involving more modality of treatments than is available from any one type of provider. It also provides a less expensive form of treatment in that chiropractic services are less expensive than the services of medical doctors and tend to minimize expensive surgery, the length of hospital stays, the extent of adjudant non-chiropractic physical therapy, and time lost from work.

43. The conspiracies alleged herein were entered for the purpose and with the effect of:

1. Specifically preventing Dr. Lim and Dr. Chinnici from engaging in the foregoing competitively superior form of practice and

2. Generally preventing other medical doctors and chiropractors from engaging in such a competitive practice by threatening plaintiff and making an example of plaintiff by virtue of the retaliation in the form of professional boycotts, loss of hospital staff privileges and defamation and destruction of plaintiff's professional reputation.

44. The conspiracies alleged herein succeeded in that they unreasonably affected competition in the relevant

market by excluding from that market the joint alopathic/ chiropractic services being offered by plaintiff and Dr. Chinnici at the Neuro-Spinal Center and served notice on others who might try to provide such unique and advantageous services that they would be punished, ridiculed, deprived of hospital staff privileges and made the victims of a professional boycott if they dared to compete in the providing of treatment for neuromuscularskeletal ailments by jointly offering the services of a medical doctor and chiropractor.

45. As a direct result of defendants' unlawful acts, Dr. Lim was forced to terminate his relationship with Dr. Chinnici and close the Neuro-Spinal Center in January, 1986.

46. As a direct and proximate result of defendants' illegal acts, plaintiff was precluded from competing against other providers of neuromuscularskeletal services by engaging in a cooperative practice with Dr. Chinnici.

47. As a result of defendants' illegal acts plaintiff has sustained lost income in an amount already in excess of $1,000,000.00 and accruing and has further lost the going concern as of today's date of a practice generating an annual income in excess of $500,000.00.

48. As a further result of defendants' illegal acts, no other hospital in northern Illinois, or in probability anywhere in the United States, having facilities equal or comparable to those of Central DuPage Hospital will grant staff privileges to a physician whose staff privileges were summarily suspended thereby implying that the physician's staff privileges posed an imminent danger to his patients. The smaller community hospitals on which

plaintiff held staff privileges at the time of defendants' actions have either declined to expand his privilege's, have limited or restricted his privileges, or have followed his cases with continuous and ongoing scrutiny by reason of his summary suspension from Central DuPage Hospital.

WHEREFORE, Plaintiff prays for relief against each and all of the defendants as follows:

1. For compensatory damages in an amount to be established at trial but not less than $1,500,000.00;

2. For an order to each defendant to pay jointly and severally, treble damages proven;

3. For punitive damages in an amount to be established at trial but not less than $3,000,000.00 jointly and severally against each defendant;

4. For reasonable attorneys fees;

5. For all costs of suit incurred herein; and

6. For such other and further relief as may he just and proper.

COUNT II:

INTERFERRENCE WITH PROSPECTIVE ADVANTAGE

Paragraphs A through 48. Plaintiff repeats and realleges alphabetic and numeric paragraphs A through 48 preceding as and for alphabetic and numeric paragraphs A through 48 of this Count II.

49. By reason of plaintiff's association with Dr. Chinnici as the Neuro-Spinal Center, plaintiff was experiencing rapid and substantial growth in his practice and, by reason thereof, reason ably anticipated that he would continue to enjoy the same or greater practice in the future.

50. Defendants had knowledge of the growth of plaintiff's practice by reason of his association with Dr. Chinnici both by reason of the proximity of the Mona Kea Condominium owners to the physical premises of plaintiff's practice as well as the fact of installation of additional chiropractic personnel in Dr. Lim's Mona Kea's offices on or about November 1, 1985. Defendants further reasonably anticipated that plaintiff would continue to enjoy the same or greater levels of the practice in the future.

51. Defendants' actions were calculated to, intended to and did in fact tortiously deprive plaintiff of the reasonably anticipated prospective benefits of his then level of practice a the reasonably foreseeable and anticipated prospective increase in the level of his practice, all to plaintiff's damage in a sum in excess of $1,500,000.00.

WHEREFORE, Plaintiff demands judgment against defendants and each of them, jointly and severally, for compensatory damages in such sum in excess of $1,500,000.00 as may be shown by the evidence and for punitive damages commensurate with defendants' intentional wrongs in an amount not less than $3,000,000.00

COUNT III:

INTERFERRENCE WITH BUSINESS RELATION

Paragraphs A through 51. Plaintiff repeats and realleges alphabetic and numeric paragraphs A through 51 of Count II as and for alphabetic and numeric paragraphs A through 51 inclusive of this Count III.

52. By reason of the matters disclosed at the special meeting of the Mona Kea South Professional Condominium Association (See Exhibit D), defendants had knowledge of the existence of an actual, existing business relation between plaintiff and Dr. Chinnici in the form of the Neuro-Spinal Center which constituted an established legal entity. 53. By reason of the matters and things occurring on and after the special meeting of April 17, 1985, defendants engaged in a wrongful, intentional and tortious interference with a known and existing business relation between plaintiff and Dr. Chinnici resulting in the destruction of that business relation, all to plaintiff's damage in a sum in excess of $1,500,000.00.

WHEREFORE, Plaintiff demands judgment against defendants and each of them jointly and severally for compensatory damages in such sum in excess of $1,500,000.00 as may be shown by the evidence and for punitive damages commensurate with defendants' intentional wrongs in an amount not less than $3,000,000.00.

COUNT IV:

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Paragraphs A through 53. Plaintiff repeats and realleges alphabetic and numeric paragraphs A through 53 of Count III as and for alphabetic and numeric paragraphs A through 53 inclusive of this Count IV.

54. The conduct of defendants were extreme, outrageous, and shocking to the conscience in the breadth, scope, intensity and vindictiveness of the assault they launched on the personal and professional qualifications of a physician engaging in lawful medical practice; further, defendants' conduct and actions were calculated and intended to and did in fact cause and continue to cause plaintiff great emotional and mental stress and anguish which caused or contributed to cause at least one hospitalization, all to plaintiff's great damage in a sum in excess of $1,000,000.00.

WHEREFORE, Plaintiff demands judgment against defendants for compensatory damages in such sum in excess of $1,000,000.00 as may be shown by the

evidence and for punitive damages commensurate with defendants' intentional wrongs in an amount not less than $3,000,000.00.

COUNT V:

VIOLATIONS OF RICO

As to defendants WENDELL FINKBEINER, MONA KEA SOUTH ENTERPRISES, INC., MONA KEA LEASING ASSOCIATION, MONA KEA OWNERS ASSOCIATION, MONA KEA SOUTH PROFESSIONAL CONDOMINIUM ASSOCIATION, JAMES GRISSOM, M.D., and DONALD GUSTAFSON M.D., Plaintiff states on information and belief:

Plaintiff adopts and realleges alphabetic and numeric paragraphs A through 48 inclusive of this Count V.

55. Plaintiff and each of the defendants are a person within the meaning of 18 U.S.C. Section 1961(3) and 1964(c).

56. The medical staff of Central DuPage Hospital is an enterprise within the meaning of 18 U.S.C. 1961(4) and 1962(c) which engaged in, or the activities of which affect, interstate commerce within the meaning of 18 U.S.C. Section 1962(c). (See further the allegations set forth in the prior section of this complaint titled Illegal Enterprise in Interstate Commerce, etc.)

57. Defendants are employed by, owned by, or otherwise associated with one or more of the enterprises referred to in numeric paragraph 56 next preceding and conducted and participated, directly or indirectly, in the

conduct of the enterprise affairs through a pattern or racketeering activity within the meaning of 18 U.S.C. Section 1961 (1) (A) or (B) (5). Specifically, the defendants engaged in extortion in violation of 18 U.S.C. Section 1951 (See the several allegations of "Illegal Enterprise in Interstate Commerce, etc." supra).

58. Further, by reason of their employment, association or ownership, these defendants had knowledge of or were participants in the nationwide illegal enterprise conducted by the American Medical Association and by their conduct in April through September, 1985 at Mona Kea confirmed, ratified and endorsed the prior predicate acts of extortion committed pursuant to the nationwide conspiracy heretofore alleged and, further, engaged in an additional act of extortion in that they sought to and acted in pursuance of a subordinate local conspiracy to deprive Dr. Lim of the benefit of his professional association with a chiropractor, to further deprive Dr. Lim of the full and free lawful use of his office condominium for professional purposes.

59. Plaintiff has been injured in his business and property by reason of the actions committed by the aforesaid defendants and is entitled to recover actual damages in excess of $1,500,000.00 together with treble damages, the costs of suit and reasonable attorneys fees under the provision of 18 U.S.C. 1964(c).

WHEREFORE, Plaintiff demands judgment against these defendants for compensatory damages in such sum in excess of $1,500,000.00 as may be shown by the evidence and for punitive damages commensurate with

defendants' intentional wrongs in an amount not less than $3.000,000.00.

PLAINTIFF DEMANDS TRIAL BY JURY

MICHAEL L. BOLOS, LTD.

BY:_____
Michael L. Bolos

MICHAEL L. BOLOS, LTD.
Attorney for Plaintiff
58 E. Clinton Street
Suite 501
Joliet, Illinois 60431
815-727-6200

Appendix D-1

In the United States District Court
Northern District of Illinois
Eastern Division

No. 89-C7753

JIT KIM LIM, M.D.

Plaintiff,

v.

CENTRAL DU PAGE HOSPITAL, et al.,

Defendants.

The Honorable Charles P. Kocoras, Judge Presiding

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Plaintiff's 1989 complaint at law is based on the same core of operative facts as his second amended complaint filed in 1986 and dismissed thereafter by order of this Court on January 5, 1988. The Seventh Circuit Court of Appeals affirmed this Court's dismissal order in an opinion issued May 26, 1989. Under settled principles of res judicata, plaintiff's 1989 action pleading alternate theories of recovery, must be dismissed.

PROCEDURAL HISTORY

a. 1986 Second Amended Complaint

Plaintiff, initially filed his complaint at law on or about August 25, 1986. (See Complaint attached hereto and marked as Exhibit A). That single-count complaint alleged anti-trust violations arising from the decision of Central DuPage Hospital ("CDH") and certain defendants to permanently suspend plaintiff's hospital staff privileges Id.

On February 2, 1987, plaintiff filed his First Amended Complaint, again alleging anti-trust violations arising from the suspension of staff privileges and praying for monetary damages and injunctive relief. (See First Amended Complaint attached hereto and marked as Exhibit B). Defendants responded to this First Amended Complaint on February 23, 1987 by filing a motion to dismiss for failure to state a cause of action. (See Motion to Dismiss, attached hereto and marked as Exhibit C). The basis of that motion was that the Defendants were immune from anti-trust liability under the state action doctrine as reflected in the Seventh Circuit decision of Ezpeleta

v. Sisters of Mercy Health Corporation 800 F.2d 119 (7th Cir. 1986) (Id.)

On March 19, 1987, conceding the arguments contained in Defendants' motion, plaintiff voluntarily withdrew his anti-trust claims and moved for leave to file a Second Amended Complaint alleging violations of civil rights under 42 U.S.C. §§ 1981, 1982, and 1985(3) as well as pendent state claims. (See plaintiff's motion and Second Amended Complaint attached hereto and marked as Exhibit D). The gist of this complaint was damage allegedly caused by "circumstances and events surrounding Plaintiff's discharge from the medical staff of Central DuPage Hospital." (Exhibit D, Motion ¶1). Specifically, in his four-count complaint plaintiff claimed violations of 42 U.S.C. §§ 1981, 1982, and 1985 (Count I), conspiracy to violate 42 U.S.C. § 1981, 1982 and 1985 (Count II), pendent state claim for interference with contractual relation (Count III), and a pendent claim for injunctive and declaratory relief (Count IV). (Exhibit D, Second Amended Complaint). The factual basis underlying all these claims was the decision by CDH and certain defendants to permanently suspend plaintiff's staff privileges allegedly because of his association with Dr. Leonard Chinnici, a chiropractor. See Exhibit D, Count I,¶¶ 8, 9(a)-(e), 11, Count II ¶¶ 1, 2, 4, 7(a)-(e), 11, Count III, ¶¶ 1-6(a)-(e), and Count IV, ¶¶ 1-12 as follows:

COUNT I:

¶8: Alleging defendants conspired to and succeeded in suspending plaintiff's staff privileges;

¶ 9(a)-(e): Alleging acts of individual defendants in bringing about suspension of plaintiff's staff privileges;

¶11: Alleging financial loss as a result of loss of staff privileges;

COUNT II:

¶1: Alleging relationship between plaintiff and Dr. Leonard Chinnici:

¶2: Alleging competitive advantage in health care following relationship with Dr. Chinnici:

¶4: Alleging Mona Kea Condominium Declaration did not preclude use of office units by chiropractors;

¶7(a)-(e): Alleging that as a result of plaintiff's relationship with Dr. Chinnici, defendants initiated an audit of plaintiff's patient care record and suspended plaintiff's staff privileges;

¶11: Alleging financial loss as a result of loss of staff privileges;

COUNT III:

¶1-6(a)-(e): Verbatim allegations of ¶¶ 1-5 of Count II and realleging financial loss as a result of suspension of staff privileges and termination of relationship with Dr. Chinnici;

COUNT IV:

Alleging injunctive relief to remedy loss of staff privileges.

On May 8, 1987, defendants again filed a Fed.R.Civ.P. 12(b)(6) motion to dismiss. (See Defendants' motion and supporting memorandum attached hereto and marked as Exhibit E). Plaintiff chose to stand on his second amended complaint and, following full briefing by the parties, this Court on January 15, 1988 issued its memorandum opinion granting defendants' motion and finding that plaintiff had no protectable property interest in staff privileges. (See January 15, 1988 Memorandum Opinion attached hereto as Exhibit F). Judgment was entered January 22, 1988 from which plaintiff appealed. (See January 22, 1988 minute order attached hereto and marked as Exhibit G).

While the appeal was in its briefing stage, the Supreme Court rendered its opinion in Patrick v. Burgett, 486 U.S. 94 (1988) on May 16, 1988, which effectively overruled the Seventh Circuit decision of Ezpeleta v. Sisters of Mercy Health Corp., 800 F.2d 119 (7th Cir. 1986), on which Defendants' initial motion to dismiss plaintiff's anti-trust claims was based. Plaintiff made no effort to amend his complaint to re-plead his anti-trust counts, instead choosing to press on with the merits of his civil rights theory.

The parties argued the case in September, 1988 and, six months later, on March 28, 1989, the Court issued its opinion affirming this Court's order and judgment dismissing plaintiff's second amended complaint. (See Opinion reported at 871 F.2d 644 (7th Cir. 1989), a copy of which is attached hereto and marked as Exhibit H). Plaintiff filed a Petition for Rehearing on May 15, 1989 which the Seventh Circuit denied May 30, 1989. (See Exhibit H).

On October 13, 1989 (three days before the instant complaint was filed) plaintiff filed a motion pursuant to Fed.R.Civ.P.

60(b)(6) to vacate this Court's January 15, 1988 order dismissing his civil rights complaint, arguing that his anti-trust claims should be reinstated because of the change in law following the Patrick v. Buraett decision. After full briefing on this motion, this Court issued its Memorandum Opinion on February 22, 1990, denying plaintiff's motion to vacate, expressly finding that plaintiff had every opportunity to amend his complaint during the pendency of the appeal, but that he failed to do so. (See Memorandum Opinion, attached hereto and marked as Exhibit I).

b. 1989 Complaint

Plaintiff's instant six-count complaint purports to state anti-trust claims (Counts I and II), pendent state claims for intentional interference with prospective business relations (Count III), intentional interference with business relationships (Count IV), intentional infliction of emotional distress (Count V), and civil RICO (Count VI), all of which allegedly arose out of the decision to suspend plaintiff's staff privileges at Central DuPage Hospital because of his association with Dr. Leonard Chinnici, a chiropractor. (See Complaint, ¶¶, D-J, Count I, ¶¶ 1, 3-5, 7-8, 10-16 21, 22; Count II, ¶¶ 1, 3-5, 7-8, 10-16, 21; Count III, ¶¶ 1, 3-5, 7 8, 10-16, 21; Count IV ¶¶ 1, 3-5, 10-16, 22, 22; Count V, ¶¶ 1, 3-5, 10-16, 21; Count VI, ¶¶ 1, 3-5, 10-16, 21, 25).

ARGUMENT

Although not among the grounds for dismissal listed under Fed.R.Civ.P. 12(b)(6), res judicata may be raised and considered by a pre-trial motion to dismiss in the interest of efficient

and expeditious judicial administration. See e.g., Florasynth Laboratories. Inc. v. Goldberg, 191 F.2d 877, 880 (7th Cir. 1951); Butterman v. Walston & Co., 50 F.R.D. 189, 191 (E.D. Wis. 1970); See also Weston Funding Corp. v. Lafayette Towers. Inc., 410 F. Supp. 980 (S.D. N.Y.), aff'd. 550 F.2d 710 (2d Cir. 1976). In such circumstances, when the record of the prior case is undisputed, courts will treat such motions as a motion for summary judgment. See e.g., Jensen v. Olson, 353 F.2d 825 (8th Cir. 1965); lB Moore's Federal Practice ¶0.408[1] (2d ed. 1988).

Here, as noted below, the record of the 1986 Lim case in its pre-trial, appellate, and post-appeal stages is undisputed and, for the reasons that follow, defendants' motion to dismiss must be granted on principles of res judicata.

I.

RES JUDICATA BARS THE ANTI-TRUST, RICO, AND PENDENT STATE LAW CLAIMS CONTAINED IN PLAINTIFF'S 1989 COMPLAINT

In his second amended complaint, plaintiff alleged that the defendants herein conspired to and succeeded in suspending plaintiff's staff privileges at Central DuPage hospital because of his association with a chiropractor, Dr. Leonard Chinnici, all in violation of 42 U.S.C. §§ 1981, 1982, and 1985. (Exhibit D, Counts I, ¶¶ 8, 9(a)-(e), 11, Count II, ¶¶ 1, 2, 4-7(a)-(e), 10(a)-(c), 11, Count II, ¶¶ 1 6(a)-(e), and Count IV, ¶¶ 1-12). Plaintiff made no effort to allege violations of civil RICO (18 U.S.C. §§ 1961 et seq.) or to allege emotional distress or intentional interference with business relations, even though those theories

of liability were at all times available. The record is undisputed that following the Supreme Court's May 16, 1988, decision in Patrick v. Burgett, 486 U.S.94, (1988), plaintiff could have sought to amend his complaint before this Court with leave from the Seventh Circuit or from the Court of Appeals itself, to reallege the anti-trust claims abandoned from his initial complaint or to allege his RICO or pendent state law claims (which were theories available from the outset). (See Memorandum Opinion, Exhibit I, pp. 10-11, citing Cohen v. Illinois Institute of Technology, 581 F.2d 658, 662 (7th Cir.), cert. den., 439 U.S. 1135 (1979) and Asher v. Harrington, 461 F.2d 890, 895 (7th Cir. 1972)). Plaintiff failed to attempt any such amendment before the Seventh Circuit, "even though the Patrick decision was already a year old by the time the final denial for a rehearing issued from that court." (See Exhibit I at p.11).

Rather than asserting all available theories of recovery against the defendants, plaintiff elected to confine his theory of liability to allege civil rights violations pursuant to 42 U.S.C. §§ 1981, 1982, and 1985(3). (See Exhibit D). Plaintiff lost on the merits and, under the prevailing doctrine of res judicata, cannot engage in claim splitting to re-litigate the anti-trust, RICO, or pendent state law claims he could have brought in the underlying action.

The traditional doctrine of res judicata "bars not only those issues which were actually decided in the prior action, but also any issues which could have been raised." Shaver v. F. W. Woolworth. Co., 840 F.2d 1361, 1364 (7th Cir.), cert. den., __U.S.__, 109 S.Ct.145 (1988) (emphasis original). See also Mortell v. Mortell Co. 887 F.2d 1322, 1324-25 (7th Cir. 1989); Henry v. Farmer City State Bank, 808 F.2d 1228, 1232 (7th Cir. 1986) (quoting Allen v. McCurry, 449 U.S. 90, 94 (1988)).

In order for res judicata to apply, three requirements must be met:

(1) an identity of the parties or their privies;

(2) an identity of the causes of actions, and;

(3) a final judgment on the merits."

Matter of Energy CoOop. Inc., 814 F.2d 1226, 1230 (7th Cir.), cert. den., 484 U.S. 928 (1987).

Plaintiff's 1989 complaint names all defendants originally named in the dismissed second amended complaint[1]. The Seventh Circuit affirmed the dismissal on the merits in its March 24, 1989 opinion. (See Exhibit H). Therefore, the first and third res judicata requirements are met in this case.

To determine if a cause of action is precluded by res judicata, the Seventh Circuit applies the "operative facts" or "same transaction" test to define "cause of action." Shaver v. F. W.

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[1]In addition, plaintiff has named defendants Dominguez, Schweitzer, Rossiter, Schmerold, Lichon, Fisk, Grissom, Gustafson and several entities, all collectively referred to as "the Mona Kea Defendants." The Mona Kea Defendants are represented by separate counsel.

Plaintiff has also named John Heitzler and Wendell Finkbeiner. Heitzler is named in his capacity as a member of the CDH Board of Governors who voted to suspend plaintiff's staff privileges. (¶15). Finkbeiner is similarly named in his capacity as a CDH vice-president who voted to amend the Mona Kea Declaration of Condominium Ownership. (¶E, 9). Because both stand in privity with defendant Central DuPage Hospital, Defendants' argument on res judicata is equally applicable to defendants Heitzler and Finkbeiner. See Donovan v. Estate of Fitzsimmons, 778 F.2d 298, 301, 315 (7th Cir. 1985) (strict identity of parties not necessary to achieve privity; parties must be "so closely aligned that they represent the same legal interest").

Woolworth, 840 F.2d 1361 (7th Cir. 1988); Car Inc. v. Ford Motor Co., 789 F.2d 589, 593 (7th Cir. 1986). As the Seventh Circuit recently explained in Matter of Energy Co-Op. Inc., supra, affirming this Court's dismissal order on grounds of res judicata:

> "Under this test, a 'cause of action' consists of a 'core of operative facts' which give rise to a remedy." Id. at 1230 (citations omitted).

The Court added:

> "This court recently endorsed the approach of section 24 of the Restatement (Second of Judgments (1982). 'Once a transaction has caused injury, all claims arising from that transaction must be brought in one suit or lost'." Id. quoting Car Carriers, Inc. v. Ford Motor co., 789 F.2d 589, 595, n.9 (7th Cir. 1986) (emphasis added).

The facts and holding in Shaver v. F. W. Woolworth Co., 840 F.2d 1361 (7th Cir. 1988) are instructive on whether causes of action are identical for purposes of res judicata. There, the appellant had initially filed suit in federal court alleging violations of the Age Discrimination in Employment Act ("ADEA") after having been laid off from his job of twenty-one years. The district court granted defendant's motion for summary judgment and declined to exercise jurisdiction over pendent state claims. Id. at 1363. Six months later, plaintiff filed a second lawsuit in state court alleging breach of employment contract and negligent employment termination. Id. The case was removed to the district court based on diversity jurisdiction and, thereafter, dismissed on the merits. Id. at 1363-64. On appeal, the defendant argued dismissal was proper on grounds of res judicata. After citing the three requirements for res judicata, the

Court focused on whether plaintiff's two causes of action were identical, holding:

> [R]es judicata operates as a bar to the litigation of matters that could have been raised in a prior proceeding. (citation). This application of the doctrine of res judicata prevents the splitting of a single cause of action and the use of several theories of recovery as the basis for separate suits. (citation). Hence, the federal definition of a cause of action, when combined with the rule against claim-splitting, requires that a plaintiff allege in one proceeding all claims for relief arising out of a single core of operative facts, or be precluded from pursuing those claims in the future. Id. at 1365 (emphasis added).

The Court found that the two causes of action were identical and, therefore, that res judicata barred the second action:

> Applying the federal definition of a "cause of action" to the case at hand, plaintiff's prior age discrimination lawsuit and the instant breach of contract action arise out of the same core of operative facts, Woolworth's liquidation of Woolco and Shaver's layoff. Since the two lawsuits involve this single core of operative facts, they constitute identical causes of action for res judicata purposes. Although this single group of facts may conceivably give rise to different claims for relief upon different theories of recovery under the federal definition a single cause of action remains. Id. (emphasis added)

See also Matter of Energy Co-Op. Inc., 814 F.2d 1226 (7th Cir.), cert. den., 484 U.S. 928 (1987) (res judicata bars

subsequent voidable preference claim after initial account balance claim had been dismissed on the merits; both claims arose from dispute over exchange agreement and therefore involved same core of operative facts); Car Carriers, Inc. v. Ford Motor Co., 789 F.2d 589 (7th Cir. 1986) (dismissal of anti-trust claims barred subsequent RICO claims under doctrine of res judicata where both claims were based on common nucleus of operative facts); Henry v. Farmer City State Bank, 808 F.2d 1232 (7th Cir. 1986) (res judicata bars plaintiff's RICO claims where plaintiffs filed to raise fraud claims against lender as a defense in state court mortgage foreclosure proceedings initiated by bank).

Here, the "core of operative facts" in plaintiff's 1986 second amended complaint and his 1989 complaint are identical - both claims seek damages arising from the same suspension of plaintiff's staff privileges at CDH because of his association with Dr. Leonard Chinnici. (Compare Exhibit D (Second Amended Complaint), Count I, ¶¶ 8, 9(a)-(e), 11; Count II, ¶¶ 1, 2, 4-7(a)-(e), 11; Count III ¶¶ 1-6(a)-(e), and Count IV, ¶¶ 1-12, with 1989 Complaint, ¶¶ D-J; Count I, ¶¶ 1, 3-5, 7-8, 10-16, 21, 22; Count II, ¶¶ 1, 3-5, 7-8, 10 16, 21; Count IV, ¶¶ 1, 3-5, 10-16, 21, 22; Count V ¶¶ 1, 3 5, 10-16, 21, and; Count VI ¶¶ 1, 3-5, 10-16, 21, 25). While this single group of facts "may conceivably give rise to different claims for relief upon different theories of recovery, under the federal definition a single cause of action remains." Shaver v. F. W. Woolworth Co., 840 F.2d at 1365. Therefore, under these established principles, plaintiff's anti-trust, RICO, and pendent claims are barred under res judicata and must be dismissed.

II.

PLAINTIFF'S CIVIL RICO CLAIM (COUNT VI) MUST BE DISMISSED ON THE MERITS FOR FAILURE TO STATE A CAUSE OF MOTION FOR WHICH RELIEF CAN BE GRANTED

In the alternative to the reasons stated in Part I of this memorandum, plaintiff's RICO claim (Count VI) must be dismissed because he has failed to allege predicate acts under 18 U.S.C. § 1962(c), has failed to allege a pattern of racketeering activity, and has impermissibly alleged that defendants and the RICO "enterprise" are one and the same.

a. Failure To Allege Predicate Acts

In Count VI, ¶¶ 23, 24, and 25, plaintiff attempts to allege predicate acts to state his RIC0 claim. Plaintiff's specific allegation is that the defendants engaged in extortion (¶24) and in illegal boycotting activities (¶25). Yet, plaintiff fails to allege what acts, if any, constituted extortion under the Hobbs Act, when if ever such acts were committed, and what "property" was extorted within the meaning of 18 U.S.C. § 1951(b)(2). Moreover, boycotts are not among the offenses listed as predicate acts under RIC0. See 18 U.S.C. ¶ 1961(1). Accordingly, for these reasons alone, Count VI should be dismissed.

b. Failure To Alleqe Pattern of Racketeering Activity

To state a claim under RIC0, a plaintiff must plead a "pattern of racketeering activity." Triad Associates. Inc. v. Chicago Housing Authority, 892 F.2d 583, 594 (7th Cir. 1989). This requires not only a sufficient allegation of predicate acts (plaintiff fails

this requirement, See Part IIa.), but also that the acts form a "pattern", which the Supreme Court recently defined as follows:

> "[T]he term 'pattern' itself requires the showing of a relationship between the predicates...and of 'the threat of continuing activity'...'It is this factor of continuity plus relationship which combines to produce a pattern

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> [T]he relatedness of racketeering activities is not alone enough to satisfy § 1962's pattern element. To establish a RICO pattern it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of continuing racketeering activity." H. J. Inc. v. Northwestern Bell Telephone Co., _U.S. _, 109 S.Ct. 2893, 2900, 2901 (1989) (emphasis original) (citing legislative history discussed in Sedima. S.P.R.L. v. Imrex, 473 U.S. 479 (1985)

In a series of cases beginning with Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986), and consistent with the Supreme Court's holding in Sedima. S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), the Seventh Circuit has followed a multi-factor, fact-specific approach to determine if a plaintiff has pled a pattern of racketeering:

> "In order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, i.e., 'transactions somewhat separated in time and place' (citations omitted). Relevant factors include [1] the number and variety of predicate acts and the length

> of time over which they were committed, [2] the number of victims, [3] the presence of separate schemes and [4] the occurrence of distinct injuries .

See also Triad Associates. Inc. v. Chicago Housing Authority supra. at 595; Brandt v. Schal Associates. Inc., 854 F.2d 948 (7th Cir. 1988); SK Hand Tool Corp. v. Dresser Industries. Inc., 852 F.2d 936, 940 (7th Cir. 1988); Medical Emergency Serv. Assoc. S.C. v. Foulke 844 F.2d 391, 395 (7th Cir. 1988); Marshall & Ilsey Trust Co. v. Pate, 819 F.2d 806, 810 (7th Cir. 1987).

Here, plaintiff has failed to allege predicate acts altogether, let alone a number of such acts or the time period during which such acts were allegedly committed. In addition, plaintiff is the sole "victim" of the conduct alleged which is but one "scheme" - to coerce plaintiff by means of suspension of staff privileges, to disassociate himself from Dr. Chinnici. Even assuming an injury has been alleged, plaintiff's sole injury is the financial loss incurred as the result of the suspension of privileges. Furthermore, there is no allegation that defendants' conduct is continuing or threatens to continue.

The Seventh Circuit has repeatedly affirmed dismissals where, as here, only one scheme results in one injury. See e.g., Medical Emergency Service Associates S.C. v. Foulke, 844 F.2d 391, 394-98 (7th Cir. 1988) (granting physicians' motion to dismiss for failure to allege pattern where plaintiff's allegations of fraud related "'to a single scheme to defraud a single victim in what appears to be a 'one shot' effort to inflict a single injury.'" [citation omitted]); SK Hand Tool Corp. v. Dresser Industries. Inc., 852 F.2d 936, 940 (alleged multiple acts of mail and wire fraud misrepresenting corporation's financial condition committed over the course of a few months failed to constitute

"pattern of racketeering activity"); Lipin Enterprises Inc. v. Lee, 803 F.2d 322, 324 (7th Cir. 1986) (same); Brandt v. Schal Associates Inc., 854 F.2d 948, 952-54 (7th Cir. 1988) (alleged predicate acts of concealment of contract specifications, threats to terminate contract, mail fraud, and acts of coercion did not amount to pattern of racketeering where acts were means to lower a single contract price and posed no threat of continuing).

Therefore, because plaintiff has failed to plead a pattern of racketeering activity, Count VI should be dismissed.

c. Failure To Distinguish Between Enterprise And Culpable Person

In paragraph 23 of Count VI, plaintiff alleges that the medical staff of Central DuPage Hospital is the unlawful enterprise under 18 U.S.C. § 1962 (c). CDH and the individually-named defendants are alleged to comprise the medical staff of CDH. See Complaint, ¶¶ E, F. The prevailing rule in this circuit, first announced in Haroco, Inc. v. American National Bank and Trust Co. of Chicago, 747 F.2d 384, 401-402 (7th Cir. 1984), aff'd. 473 U.S. 606 (1985), is that the "culpable person" and the "enterprise" cannot be the same entities under 18 U.S.C. § 1962 (c).

Here, plaintiff makes no effort whatsoever to distinguish the CDH defendants and the enterprise. Therefore, under the prevailing rule of this Circuit, Count VI should be dismissed.

III.

THE PENDENT CLAIMS ALLEGED IN COUNTS III, IV AND V MUST BE DISMISSED

Because plaintiff's anti-trust and RICO counts are barred under res judicata (and in any event the RICO claim fails on the merits), this Court should exercise its discretion and dismiss plaintiff's pendent state law claims for intentional interference with prospective business relations (Count III), intentional interference with business relationships (Count IV), and intentional infliction of emotional distress (Count V). See Duckworth v.Franzen, 780 F.2d 645 (7th Cir. 1985), cert. den. 479 U.S. 816 (1986).

CONCLUSION

Res judicata bars plaintiff's 1989 complaint which effectively seeks reinstatement of abandoned anti-trust claims, dismissed pendent state claims, and which attempts to state civil RICO claims plaintiff could have raised at the outset but did not. In addition, plaintiff's RICO claim must be dismissed on the merits for its failure to allege essential elements of a civil RICO claim. For these reasons, the defendants respectfully request that plaintiff's complaint be dismissed with prejudice.

Respectfully submitted,

Paul J. Peralta
One of the Attorneys
forDefendants

LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, Illinois 60603
(312) 443-1715 (P. J. Peralta)

Appendix D-18

CERTIFICATE OF SERVICE

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

The undersigned, being first duly sworn, on oath deposes and says that she served the above and foregoing **Memorandum Of Law In Support Of Defendants' Motion To Dismiss** on:

Michael L. Bolos, Jr.
Michael L. Bolos, Ltd.
Bank of Shorewood Building, Suite 200
700 West Jefferson Street
Shorewood, Illinois 60435

John J. Walsh, III
Pretzel & Stouffer Ltd.
One South Wacker Drive, Suite 2500
Chicago, Illinois 60606

by messenger delivery prior to 5:00 p.m. on this 29th day of March, 1990.

SUBSCRIBED AND SWORN to before me
this 29th day of March, 1990.

Kathleen Pabst

Darlene Keating
Notary Public

In the United States District Court
Northern District of Illinois
Eastern Division

No. 89-C7753

JIT KIM LIM, M.D.

Plaintiff,

v.

CENTRAL DU PAGE HOSPITAL, et al.,

Defendants.

The Honorable Charles P. Kocoras, Judge Presiding

MEMORANDUM OF LAW IN OPPOSITION TO CERTAIN DEFENDANTS' RES JUDICATA MOTION TO DISMISS

Plaintiff, JIT KIM LIM, M. D., by his attorneys MICHAEL L BOLOS, LTD., submits the following as Response to the Motion to Dismiss submitted by certain defendants asserting this action to be res judicata.

I.

BECAUSE HIS 1986 ACTION DID NOT AFFORD PLAINTIFF A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS ANTITRUST CLAIMS, THE DOCTRINE OF RES JUDICATA DOES NOT BAR THIS ACTION

Res judicata is a judicially created doctrine which precludes a party from again contesting a matter which he has once "had a full and fair opportunity to litigate". Montana v. United States, 440 U.S. 147, 153-4, 99 S.Ct. 970 (1979) However, it is equally well established that the preclusive bar of res judicata should not be applied "when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue." Kremer v. Chemical Const. Corp.., 456 U.S. at 480-1, 102 S. Ct. 1883, 1897 (1982). Montana v. United States, F.2d 878, 884 (7th Circ.. op cit., Jones v. City of Alton., 757 1985) "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness or fairness of procedures followed in the prior litigation." Kremer v. Chemical Const. Corp.. op cit., Montana v. U.S. op cit. "Claim preclusion [res judicata] does not bar litigation of issues which could not have been litigated" in the prior action. Jones v. City of Alton, 757 F.2d 878, 884 (7th Circ., 1985) "[W]hile the purpose of the doctrine [of res judicata] is to prevent a party from litigating the same issue twice, it should not be used to preclude a party from

litigating the matter at all." Jones v. City of Alton, 757 F.2d at 885.

The Jones decision is particularly instructive. Jones was a black police officer against whom the city of Alton had filed a complaint for discharge with the Civil Service Commission. At the hearing on the complaint, Jones attempted to introduce evidence showing that the discipline sought against white police officers who had committed similar offenses to his was less drastic than discharge, thereby demonstrating racial motivation in the discharge coplaint. The Commission rejected the evidence as neither relevant nor material. On administrative review the circuit court held that the proffered evidence was clearly irrelevant. The 5th District Appellate Court affirmed finding the evidence insufficient to prove disparate treatment. (Jones v. Civil Service Comm'n, 80 Ill.App.3d 74, 35 Ill.Dec. 422, 423 (5th Dist., 1980))

Jones then filed suit in the district court invoking 42 U.S.C. 1983 where the district court granted defendants' motion to dismiss on res judicata grounds. The 7th Circuit reversed, holding that because plaintiff was prevented from presenting his disparate treatment defense by reason of the mistaken theory that evidence thereof was irrelevant, plaintiff had not been furnished a full and fair hearing. (757 F.2d at 8B6)

Plaintiff respectfully submits that this court should adopt the Jones analysis and decline to apply re-judicata to bar plaintiff's anti-trust and pendent law claims.

Here, as in Jones, plaintiff chosen theory was not available to him in his first action. Under the then binding precedent of the 7th circuit, attempted prosecution of plaintiff's antitrust claim

in the district court was tantamount to a sanctionable wrong. Accordingly, plaintiff could not have pursued his antitrust claim in the district court.

After this court had dismissed plaintiff's civil rights complaint, and after plaintiff had filed his main brief on appeal, the Supreme Court decided Patrick v. Burgett (108 S.Ct. 1658 (1988)) a decision which effectively overruled Ezpeleta. Plaintiff filed a Motion with the Court of Appeals advising of the Patrick decision, stating that plaintiff wished to reinstate his antitrust counts and requesting remand[1]. (See, 'Motion for Leave to Cite Recent Authority and for Additional Procedural Relief" appended hereto with Notice of Filing) Although "[t]he general practice in the Seventh Circuit is to then remand the issue to the district court for resolution in its discretion" (Lim v. C.D.H., 86 C 6333, Memorandum order of 2-22-90, p.10) the Court of Appeals did not do so. The Court of Appeals affirmed the district court's dismissal of the civil rights counts in opinion which did not address the question of reinstatement of the antitrust counts. Indeed the only oblique reference to plaintiff's antitrust claims was the Court's' obscure observation that plaintiff's "principal—now, perhaps, his only—claim was that the defendants had deprived him of property" under the civil rights statutes. (Slip opinion at 1)

On October 13, 1989 plaintiff filed this action as well as a Motion under Rule 60(b) seeking to reinstate the antitrust counts in the 1986 filing. On February 22, 1990 the district court denied the Motion to Reinstate the 1986 filing.

---

[1]The 7th Circuit has held that a motion requesting leave to amend is untimely if made after filing of the brief on appeal. See, Scott v. Schmidt, 773 F.2d 160, 163 (7th Circ., 1985). Inasmuch as the Patrick decision did not issue until after the filing of the Brief on appeal, plaintiff could not earlier have cited the decision or requested amendment on its authority

It is clear that when plaintiff first filed his 1986 action he sought to advance an antitrust theory but was precluded by the 7th Circuit decision in Ezpeleta. Plaintiff unsuccessfully attempted to reinstate before the Court of Appeals and again the District Court. Despite all efforts in the prior action, plaintiff had no opportunity to litigate the merits of his antitrust claim.

To grant res judicata effect to the judgment in the 1986 filing would be to preclude plaintiff from litigating now that which he was precluded from litigating in the earlier filing. Such a result is clearly contrary to the policy which underlies the doctrine of res judicata. "[W]hile the purpose of the doctrine is to prevent a party from litigating the same issue twice, it should not be used to preclude a party from litigating the matter at all." Jones v. City of Alton, 757 F.2d at 878 (7th Circ., 1985)

Defendants' res judicata motion to dismiss must be denied.

II.

RES JUDICATA DOES APPLY TO COUNT VI ALLEGING RICO VIOLATIONS AGAINST THESE DEFENDANTS.

In his 1986 filing, Plaintiff did not include or attempt to include a cause of action under RICO. Accordingly, as to the Defendants who had been named in the 1986 filing the doctrine of res judicata is a bar to prosecution of a RICO claim.

III.

RES JUDICATA DOES NOT BAR PLAINTIFF'S PENDENT STATE LAW CLAIMS.

Plaintiff's pendent law claims were dismissed for want of jurisdiction in the 1986 filing after the court had dismissed the federal civil rights counts. Under FRCP 41(b) a dismissal for want of jurisdiction does not constitute an adjudication on the merits. Accordingly, the prior dismissal does not render these claims res judicata.

MICHAEL L. BOLOS, LTD.

MICHAEL L. BOLOS, LTD.
Attorney for Plaintiff
Suite 501
58 East Clinton Street
Joliet, Illinois 60431
(815) 727-6200

Appendix E-7

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

JIT KIM LIM, M.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. 88-1267
	)	
CENTRAL DUPAGE HOSPITAL, et al.,	)	
	)	
Defendants.	)	

NOTICE OF FILING

TO: Hugh C. Griffin, Esq.
David C. Hall, Esq.
Paul Peralta, Esq.
LORD, BISSELL & BROOK

Notice is hereby given that on Thursday, September 15, 1988, we delivered to the Clerk of the United States Court of Appeals, 219 S. Dearborn, Chicago, Illinois, Plaintiff-Appellant's MOTION FOR LEAVE TO CITE RECENT AUTHORITY AND FOR ADDITIONAL PROCEDURAL RELIEF, a copy of which is appended hereto and herewith served upon you.

MICHAEL L. BOLOS, LTD.
LTD
Suite 2150
150 N. Michigan Avenue
Chicago, Illinois 60601
(312) 236-4640

MICHAEL L. BOLOS,

Michael L. Bolos

Appendix E-8

CERTIFICATE OF SERVICE

MICHAEL L. BOLOS, attorney for Plaintiff-Appellant, hereby certifies that he caused a copy of this Notice of Filing and Appended Motion to be served upon the above named counsel hand delivery on Thursday, September 15, 1988 before 5:00 p.m.

_____

Michael L. Bolos

Appendix E-9

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

JIT KIM LIM, M.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. 88-1267
	)	
CENTRAL DUPAGE HOSPITAL, et al.,	)	
	)	
Defendants.	)	

MOTION FOR LEAVE TO CITE RECENT AUTHORITY AND FOR ADDITIONAL PROCEDURAL RELIEF

Plaintiff-Appellant JIT KIM LIM, M.D., moves this Honorable Court for leave to cite additional authority and, pursuant thereto, to request additional procedural relief, all as more fully set forth hereinbelow.

1. The matters brought before the Court by this Motion are not dispositive of any issue in this appeal.

2. This action was originally filed seeking relief for violation of Federal Anti-Trust statutes (15 U.S.C. Secs. 1, 2, 18 and 26). Defendants moved to dismiss the anti-trust counts on two bases: (a) that the action was foreclosed by the "state action doctrine" and (b) that the complaint did not allege a sufficient nexus to interstate commerce to invoke the provisions of 15 U.S.C. 1, 2, 18 and 26.

3. Subsequent to the filing of this action, this Court decided Ezpeleta v. Sisters of Mercy, 800 F.2d 119 (1986), which held, insofar as herein pertinent, that the "state action

doctrine" foreclosed recourse to the anti-trust laws in actions involving revocation or non-renewal of physician staff privileges.

4. Based upon the Ezpeleta decision, it was clear that the anti-trust theories could not be maintained. Plaintiff therefore withdrew the anti-trust counts and amended to allege violations of 42 U.S.C. 1981 and 1982. It is from the dismissal of these latter counts that the instant appeal is taken.

5. Subsequent to the filing of this appeal, indeed shortly after the filing of Plaintiffs main brief, the U.S. Supreme Court decided Patrick v. Burget, copy of opinion attached, which held that law requirements pertaining to peer review procedures did not constitute such a pervasive mandatory scheme of regulation as would invoke the state action doctrine.

6. After learning of the Patrick v. Burget decision, Plaintiff's counsel requested Plaintiff to audit his billings back to 1982 to determine the amounts billed to out of state patients, out of state insurance carriers, medicare and public aid in order to document and verify the extent to which plaintiff's practice could be demonstrated to be in or affecting interstate commerce. This audit has just recently completed and reveals such billings significantly excess of $1,000,000.

7. Although the law is not clear on the point, there is certainly substantial basis for-argument that the billings in question supply the requisite nexus with interstate commerce to invoke federal anti-trust jurisdiction.

8. Based upon the foregoing, Plaintiff wishes to reassert the anti-trust claims which had been withdrawn in the district court. Inasmuch as the anti-trust claims had not been ruled upon by the district judge, those claims are not properly

before this Court as part of this appeal.

Wherefore, Plaintiff moves this Court to receive the additional authority and for leave to reinstate the anti-trust counts of this litigation and for remand thereof to the district court.

MICHAEL L. BOLOS, LTD.

_____

Michael L. Bolos
Attorneys for
Plaintiff-Appellant

MICHAEL L. BOLOS, LTD.
Suite 2150
150 North Michigan Avenue
Chicago, Illinois 60601
(312) 236-4640

JIT KIM LIM, M.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. 88-1267
	)	
CENTRAL DUPAGE HOSPITAL, et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT

MICHAEL L. BOLOS, being first duly sworn, deposes and states as follows:

1. I am the attorney chargeable with handling of the appeal of Plaintiff-Appellant JIT KIM LIM, M.D., and if called could competently testify to the matters set forth in this Affidavit.

2. I have prepared and submitted Plaintiff-Appellant's Motion for Leave to Cite Recent Authority and for Additional Procedural Relief and the factual matters set forth therein are true and correct.

FURTHER AFFIANT SAYETH NOT.

Michael L. Bolos

Signed and sworn to before me this
15th day of September, 1988.

Cathy A. Persin
Notary Public

Appendix F-1

United States Court of Appeals for the Seventh Circuit

No. 88-1267
No. 86-C-6333

JIT KIM LIM, M.D.

Plaintiff-Appellant,

v.

CENTRAL DU PAGE HOSPITAL, et al.,

Defendants -Appellees.

Appeal from the United States District Court for the
Northern District of Illinois Eastern Division
The Honorable **Charles P. Kocoras**, Judge Presiding

RESPONSE TO PLAINTIFF-APPELLANT'S MOTION FOR LEAVE TO CITE RECENT AUTHORITY AND FOR ADDITIONAL PROCEDURAL RELIEF

Defendants-appellees, CENTRAL DUPAGE HOSPITAL, et.al., hereby object to plaintiff-appellant's motion for leave to reinstate certain cite additional authority, for leave to counts, and for remand, and in opposition thereto states as follows:

1. As plaintiff-appellant readily concedes (Motion ¶¶1,8) the matters raised in his motion are wholly irrelevant to the issue preserved on appeal, addressed in the briefs, and argued before this Court — whether hospital staff privileges constitute a protectible property right under 42 U.S.C. §§1981, 1982 and 1985.

2. The record clearly reflects that the district court made no ruling on the propriety of plaintiff's antitrust claims, asserted in the initial and amended complaints, and now raised for the first time before the Court. Instead, the antitrust claims were voluntarily withdrawn (Pl. App. Br., p.6) and a second amended complaint alleging violations of 42 U.S.C. §1981, 1982, and 1985 was filed Harch 24, 1987 (R. 19). An amended complaint, complete in itself, supersedes the prior pleading. See e.g. Lubin v. Chicago Title and Trust Company, 260 F.2d 411, 413 (7th Cir. 1958). Accordingly, there was no issue preserved on the antitrust claims for this Court's review. See e.g., United States v. Miroff, 353 F.2d 481, 483-84 (7th Cir. 1965) (issue not raised in district court by pleading, brief, or oral argument would not be considered based on established principle that appellate review is restricted to questions and issues made, considered, and decided in the lower court); Glaros v. Perse, 628 F.2d 679, 681 (lst Cir. 1980) (in reviewing district court's dismissal of complaint, court of appeals was required to disregard additional allega-

tions on appeal since scope of review was limited to allegations contained in complaint itself)

3. Supplemental authorities may be cited but only where pertinent to the issues raised. F.R.A.P. 28(j). The Supreme Court's decision in Patrick v. Burgett, U.S. 108 S.Ct. 1658 (1988) is irrelevant as to the 42 U.S.C. §1981, 1982 and 1985 issue before this Court.

4. Under 28 U.S.C. §2106 this Court is empowered to remand cases "as may be just under the circumstances." Thus, where law is enacted or ruled upon during the pendency of an appeal and where such law is critical to the issue on appeal, appellate courts have remanded cases for further consideration in light of the new law. E.g. Bradley v. General Motors Corp., 512 F.2d 602 (6th Cir. 1975) case remanded where, during pendency of appeal, state supreme court issued ruling on statute of limitations, reversing case law upon which district court squarely relied in its holding that cause of action was time-barred); Jefferies v. Sugarman, 481 F.2d 414 (2d Cir. 1973) cert. den. 420 U.S. 924 (1975) (Supreme Court decision addressing validity of state public assistance statutes which was handed down while appeal on the very issue was pending, required remand for district court to reconsider its previous ruling on the same issue). In contrast, the ruling in Patrick does not address the 42 U.S.C. §§1981, 1982 and 1985 issue pending before this Court or preserved for review.

5. Having voluntarily abandoned his antitrust count and having elected to stand on his amended complaint which contained no antitrust claim and, having allowed judgment to be entered against him on the amended

complaint, it is clearly too late for plaintiff to resurrect his antitrust claim in this appeal or in this case. See Hupp v. Gray, 500 F.2d 993, 997-98 (7th Cir. 1974) (finding appellant abandoned claim on appeal, which claim had been made in initial complaint but not included in proposed amended complaint on review).

6. The only conceivable issue is whether plaintiff could now file a new antitrust complaint in a new case in the District Court, but he has not yet done so and the District Court is the proper forum to first decide this issue if and when it arises.

Accordingly, for the foregoing reasons appellees respectfully request this Court to deny plaintiff-appellant's motion.

Respectfully submitted,

_____

Paul J. Peralta
One of the Attorneys for
CENTRAL DUPAGE HOSPITAL,
et.al., Defendants-Appellees

LORD, BISSELL & BROOK
115 South LaSalle
Chicago, Illinois 60603
443-1715 (P. J. Peralta)

Appendix G-1

United States District Court,
Northern District of Illinois,
Eastern Division

Name of Assigned Judge or Magistrate	Charles P. Kocoras
Case Number	89-C-7753
Date	December 5, 1990
Case Title	Lim -v- Central DuPage Hospital et al

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) Judgement is entered as follows (2) ✖ Other docket entry

Enter Memorandum Opinion: Motion to dismiss defendants Central DuPage Hospital, Healthcorp Affiliates, Douglas Mains, Ronald Severino, David Fox, George Holzhauer, Peter Brusca, Raymond Dieter, David Barrett, Muhammed Sharif, Robert Wilson, Angelo Sorce, Donald White, William Petrando, Jeffrey Johnson, Dennis Baker, James O'Brien, Vincent Sackett, Renato Imana, Harb Boury, George Handley, Richard Niedballa, Richard Meyer, Neil Agruss, Wendell Finkbeiner and John Heitzler is granted. Said defendants are hereby dismissed.

(7) ✖ Status Bearing ✖ Set for 26 Dec. 1990 at 9:30a.m.

(12) ✖ For further detail see ✖ order attached to the original minute order forms
✖ Docketing to mail notices

Appendix G-2

United States District Court
Northern District of Illinois
Eastern Division

No. 89-C-7753

JIT KIM LIM, M.D.	)
Plaintiff,	)
	)
v.	)
	)
CENTRAL DU PAGE HOSPITAL, a corp.	)
HEALTHCORP AFFILIATES, a corp.,	)
DAVID FOX, GEORGE HOLZHAUER,	)
WENDELL FINKBEINER, PETER	)
BRUSCA, M.D., RAYMOND	)
DIETER, M.D., DAVID BARRETT,	)
M.D., MUHAMMAD	)
SHARIF, M.D., ROBERT WILSON, M.D.,	)
JEFFREY JOHNSON, M.D., DENNIS	)
BAKER, M.D., JAMES O'BRIEN, M.D.,	)
VINCENT SACKETT, M.D. RENATO	)
IMANA, M.D., HARB BOURY, M.D.,	)
DOUGLAS B. MAINS, M.D., RONALD	)
M. SEVERINO, M.D., J. GEORGE	)
HANDLEY, M.D., RICHARD	)
NIEDBALLA, M.D., RICHARD MEYER,	)
M.D., NEIL AGRUSS, M.D., RICHARD	)
DOMINGUEZ, M.D., JAMES GRISSOM,	)
M.D., DONALD GUSTAFSON, M.D.	)

JOHN A HEITZLER, M.D., MONA KEA SOUTH ENTERPRISES, INC., a corp., MONA KEA LEASING ASSOCIATION, a corp., MONA KEA OWNERS ASSOCIATION, a corp., and MONA KEA SOUTH PROFESSIONAL CONDOMINIUM ASSOCIATION, a corp.,

Defendants.

Charles P. Kocoras, District Judge

MEMORANDUM OPINION

This matter comes before the court on renewal of a motion to dismiss Plaintiff Lim's amended complaint made by Defendants Central DuPage Hospital, Healthcorp Affiliates, Douglas Mains, Ronald Severino, David Fox, George Holzhauer, Peter Brusca, Raymond Dieter, David Barrett, Muhammed Sharif, Robert Wilson, Angelo Sorce, Donald White, William Petrando, Jeffrey Johnson, Dennis Baker, James O'Brien, Vincent Sackett, Renato Imana, harb Boury, George Handley, Richard Niedballa, Richard Meyer, Neil Agruss, Wendell Finkbeiner, and John Heitzler. For the following reasons, the above moving defendants' motion to dismiss is granted.

BACKGROUND

Prior to August 25, 1986, the plaintiff, a neurosurgeon, was on staff at Defendant Central DuPage Hospital ("CDH"). On that day CDH suspended the plaintiff's medical staff privileges,

ostensibly on the ground that it had found a series of abnormalities in the plaintiff's record of patient care. Plaintiff felt that the reasons given for what was in effect his dismissal were merely pretextual and filed suit in this court on the very day the decision became final.

Plaintiff's 1986 complaint was grounded solely in federal anti-trust law. Comprised of a single count, it alleged that the real reason behind the plaintiff's suspension was that he had entered into a medical services business with a chiropractor named Leonard Chinnici. Plaintiff named as defendants not only CDH but the physicians at CDH involved in the suspension, arguing that they had all conspired to deprive him of federal economic rights as guaranteed by the Sherman and Clayton anti-trust acts. (The plaintiff later added a second count alleging violations of the Illinois procedural rules governing peer review. This claim was abandoned somewhere along the course of the litigation.)

Two days later the suit was filed, however, the Seventh Circuit handed down its decision in Ezpeleta v. Sisters of Mercy Corporation, 800 F.2d 119 (7th Cir. 1986). Ezpeleta was the latest in a series of decisions in which the Seventh Circuit had concluded "that actions taken within the Indiana medical peer review process that result in the suspension of staff privileges are exempt from federal anti-trust law under the state action doctrine" Id. at 121. The Seventh Circuit further stated that the state action rule enunciated in these cases was now so clear that further complaints propounding this theory of liability were to be deemed frivolous, thereby making the lawyers responsible for filing them vulnerable to Rule 11 sanctions. Id. at 122.

On the basis of this line of authority and in particular Ezpeleta the defendants moved to dismiss the anti-trust claims as failing

to state a cause of action. They argued that the Illinois statutory peer review procedures involved at least as much state involvement as those of Indiana, thus immunizing any actions taken thereunder from anti-trust liability.

Realizing the strength of Ezpeleta and its forebears, and wishing to avoid the imposition of sanctions, the plaintiff chose to withdraw his anti-trust claims, thereby mooting the motion to dismiss. In their place, the plaintiff put forward claims of racial discrimination under various provisions contained in the Civil Rights Acts.

Defendants again moved to dismiss under Rule 12(b)(6), this time arguing that the plaintiff had no protectable property interest in his hospital staff privileges. We agreed and, on January 15, 1988, dismissed the complaint. Judgment was entered against the plaintiff one week later on January 22, 1988.

Plaintiff promptly appealed to the Seventh Circuit. However, shortly after he filed his opening brief, the United States Supreme Court decided Patrick v. Burget, 486 U.S. 94, 108 S. Ct. 1658 (1988). In Patrick the Court held that the sort of procedural supervision that occurs in the average peer review statute is not sufficient state action to warrant anti-trust immunity under Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307 (1943). Thus, the result of the decision in Patrick was that the Ezpeleta approach to state action was effectively overruled, thereby eliminating the legal barrier which had until then stood in the way of the plaintiff's anti-trust claims.

Plaintiff thus found himself on appeal defending the legal sufficiency of racial discrimination claims which were only added as a afterthought to preserve some sort of legal cause of

action. His preferred anti-trust claims, which were now colorable after Patrick, had been dropped over a year ago. Unfortunately, plaintiff responded to this situation by simply proceeding to a resolution of his racial discrimination claims without pursuing the earlier claims in the court of Appeals or this court.

On March 24, 1989, the Seventh Circuit issued its decision in Lim v. Central DuPage Hospital, 871 F.2d 644 (7th Cir. 1989). The panel affirmed this court's dismissal of the plaintiff's racial discrimination claims, thereby disposing of all the claims which the plaintiff had substituted for the abandoned anti-trust claims. Plaintiff's petition for a rehearing en banc was subsequently denied on May 15, 1989, and the judgment in the 1986 lawsuit became final for all purposes when he failed to seek further review in the United States Supreme Court.

On October 13, 1989, however, the plaintiff filed a motion to vacate this court's January 15, 1988 final judgment. Citing Rule 60(b)(6) of the Federal Rules of Civil Procedure, the plaintiff argued that the dramatic change in Seventh Circuit anti-trust law worked by Patrick constituted an extraordinary circumstance warranting the opening of these proceedings for the purpose of repleading the lost anti-trust claims.

Three days later, on October 16, 1989, the plaintiff filed the present action based on substantially the same facts as the 1986 action. In addition to the anti-trust claims, this action asserts a civil RICO and pendent state-law tort claims, and names more defendants. The defendants who were not parties to the prior action, with the exception of Finkbiener and Heitzler, answered the plaintiff's amended complaint. The defendants who were parties to the prior action, which the addition of Finkbiener and Heitzler, moved to dismiss the plaintiff's claims against them.

On February 22, 1990 we denied plaintiff's motion to vacate the earlier judgment entered against him on January 22, 1988. We found the granting of Rule 60(b) relief inappropriate as the plaintiff had failed to follow available procedures to amend his complaint to replead the anti-trust claims. Plaintiff failed to avail himself of these procedures before the Seventh Circuit even though the decision in Patrick was already a year old by this time the final denial for a rehearing issued from that court.

Now, the defendants listed above as the moving defendants renew their March 1990 motion to dismiss plaintiff's complaint, pursuant to Federal Rule of civil Procedure 12(b)(6), for failure to state a cause of action.

DISCUSSION

In support of their motion the defendants argue 1) res judicata, 2) failure of the plaintiff to allege requisite predicate acts and a pattern of racketeering in his RICO claim, and 3) lack of federal subject matter jurisdiction over the pendant state claims. Plaintiff has filed no answer to these defendants' motion to dismiss.

The issues this court will address are 1) whether res judicata bars the plaintiff's action against the moving defendants, and 2) whether this court lacks subject matter jurisdiction over the plaintiff's pendant state claims against the moving defendants.

LEGAL STANDARD FOR MOTION TO DISMISS

In order to have a claim dismissed under Rule 12(b)(6), the moving party must meet a high standard. The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits of the case. Under the "simplified notice pleading" of the Federal Rules of Civil Procedure, the allegations of a complaint should be construed liberally and "the complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 46, 78 S. Ct. 99, 102 L.Ed.2d 80 (1957); see also Lewis v. Local Union No. 199 of Laborers' Intern. Union of North America, AFL-CIO, 750 F.2d 1368 (7th Cir. 1984). Generally, "mere vagueness or lack of details does not constitute sufficient grounds for a motion to dismiss." Strauss v. City of Chicago, 760 F.2d 765 (7th Cir. 1985).

When considering a defendant's motion to dismiss the Court must view the complaint's allegations in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); Conley, 355 U.S. at 45, 78 S. Ct. at 102. All well-pleaded facts and allegations in the plaintiff's complaint must be taken as true, Ed Miniat, Inc., v. Globe Life Ins. Group, Inc., 805 F.2d 732, 733 (7th Cir. 1986), and the plaintiff is entitled to all reasonable inferences that can be drawn therefrom. "Furthermore, a complaint is not required to allege all, or any, of the facts logically entailed by the claim .... [A]complaint does not fail to state a claim merely because it does not set forth a complete and convincing picture of the alleged wrongdoing." American Nurses Ass'n v. State of Illinois, 783 F.2d 716, 727 (7th Cir. 1986).

Appendix G-9

RES JUDICATA

The defendants argue that the plaintiff is barred by res judicata from bringing his RICO claim or his abandoned anti-trust claim. Indeed, the doctrine of res judicata "bars not only those issues which were actually decided in the prior action, but also any issues which could have been raised." Shaver v. F.W. Woolworth, co., 840 F.2d 1361, 1364 (7th Cir. 1988); See also Mortell v. Mortell Co., 887 F.2d 1322, 1324 (7th Cir. 1989); and Henry v. Farmer City State Bank, 808 F.2d 1228, 1232 (7th Cir. 1986).

1. Background

In 1987 in his prior suit the plaintiff field a second amended complaint, alleging that the defendants who move herein (with the exception of Finkbeiner and Heitzler) conspired to and succeeded in suspending plaintiff's privileges at CDH because of his association with a chiropractor, Dr. Leonard Chinnici. The plaintiff claimed violations of 42 U.S.C. §§ 1981, 1982, and 1985. Plaintiff made no effort at that time to claim emotional distress, intentional interference with business relations, interference with prospective advantage, or civil RICO violations, even though those theories of liability were at that time available.

Later, following the Supreme Court's May 16, 1988, decision in Patrick v. Burget, 486 U.S. 94 (1988), plaintiff could have sought to reestablish his abandoned anti-trust claims or to allege his RICO or pendant state law claims by requesting leave from the Seventh Circuit. See Lim v. Central DuPage Hospital, No. 86 C 6333,

Slip. op. p. 10-11 (N.D. Ill. February 22, 1990) (J. Kocoras), citing Cohen v. Illinois Institute of Technology, *581* F.2d *658, 662;* and Asher v. Harrington, 461 P.2d 890, 895 (7th Cir. 1972). In the Seventh Circuit it is still possible to amend a complaint after appeal has been taken. The procedure set out by the case law is for the party seeking amendment to make the initial motion before the Court of Appeals because it is the only court with jurisdiction at that moment. The general practice in the Seventh Circuit is to then remand the issue to the district court for resolution in its discretion pursuant to Rule 15(a). See, e.g., Cohen v. Illinois Institute of Tech., 581 F.2d 658, 662 (7th Cir. 1978); citing Asher v. Harrington, 461 F.2d 890, 895 (7th Cir. 1972). However, plaintiff failed to pursue any such amendment before the Seventh Circuit, "even though the Patrick decision was already a year old by the time the final denial for a rehearing issued from that court." Lim, No. 86 C 6333 at p. 11 (N.D. Ill. February 22, 1990) (Kocoras, J.). Consequently, rather than asserting against the defendants all available theories of recovery, plaintiff elected to confine his theory of liability to allege civil rights violations pursuant to 42 U.S.C. §§ 191, 1982, AND 1985(3).

2. Analysis

In order for res judicata to apply, three requirements must be met:

1. an identity of the parties or their privies in the two suits

2. an identity of the causes of action in both the earlier and later suit, and

3. a final judgment on the merits in the earlier action.

Matter of Energy Co-op. Inc., 814 F.2d 1226, 1230 (7th Cir. 1987); Shaver, 840 F.2d at 1364.

Here, the first requirement is met as the plaintiff's 1989 amended complaint names all of the defendants originally named in the dismissed 1987 second amended complaint, plus some additional defendants.[1] In addition, the third requirement was met when the Seventh Circuit affirmed this court's dismissal of the plaintiff's prior claim. Lim v. Central DuPage Hospital, 871 F.2d 644 (7th Cir. 1989)

Now we turn to the final requirement to applying the doctrine of res judicata. To determine if a cause of action is precluded by res judicata, the Seventh Circuit applies the "operative facts" or "same transaction" test to define "cause of action." Shaver, 840 F.2d at 1365; Car Carriers, Inc. v. Ford Motor Co., 789 F.2d 589, 593, 7th Cir. 1986), aff'd 745 F.2d 1101. "Under tis test, a 'cause

[1] In this group of defendants plaintiff also named John Heitzler and Wendell Finkbeiner. Heitzler is named in his capacity as a member of the CDH Board of Governors who voted to suspend plaintiff's staff privileges. Finkbeiner is similarly named in his capacity as a CDH vice-president who voted to amend the Mona Kea Declaration of Condominium Ownership. Because both defendants stand in privity with defendant CDH, the moving defendant's argument on res judicata is equally applicable to Defendants Heitzler and Finkbeiner. See Donovan v. Estate of Fitzsimmons, 778 F.2d 298, 301, 315 (7th Cir. 1985).

of action' consists of a 'core of operative facts' which give rise to a remedy." Matter of Energy Co-op, 814 F.2d at 1230. "Once a transaction has caused injury, all claims arising from that transaction must be brought in one suit or lost." Car Carriers, 789 F.2d at 593 (dismissal of anti-trust claims barred subsequent RICO claims under doctrine of res judicata where both claims were based on common nucleus of operative facts). See Matter of Energy Co-op, 814 F.2d at 1235 (res judicata bars subsequent voidable preference claim after initial account balance claim had been dismissed on the merits; both claims arose from dispute over exchange agreement and therefore involved same core of operative facts).

Here , the "core of operative facts" in plaintiff's 1987 second amended complaint and his current 1989 amended complaint are the same - both claims seed damages arising from the same suspension of plaintiff's staff privileges at CDH because of his association with Dr. Leonard Chinnici. Thus, the final requirement to applying res judicata is met.

Accordingly, under these established principles, plaintiff's anti-trust and RICO claims are barred under the doctrine of res judicata. See Car Carriers, 789 F.2d at 597 (District court relied on res judicata to dismiss the federal question claims. State question claims were dismissed for lack of pendent jurisdiction). Accordingly, plaintiff's RICO and anti-trust claims against the moving defendants are dismissed.

As there has been no prior adjudication against the remaining defendants by the plaintiff and those defen-

dants have not moved to dismiss the claims against them, the claims against the non-moving defendants are preserved.

PENDANT STATE CLAIMS

The defendants argue that because the plaintiff's anti-trust and RICO counts are barred under res judicata, this court should exercise its discretion and dismiss plaintiff's pendent state law claims. See Duckworth v. Frazen, 780 F.2d 645, 656 (7th Cir. 1985), cert. den. 479 U.S. 816 (1986) (Pendent claim jurisdiction should normally be relinquished by the trial court when trial court dismisses federal claim). We agree, and accordingly, plaintiff's pendant state claims for interference with prospective advantage (count II), interference with business relation (count III), and intentional infliction of emotional distress (count IV) are dismissed against the non-moving defendants. The pendent state claims against the remaining defendants are preserved.

Charles P. Kocoras
United States District Judge

Dated: December 5, 1990

Appendix H-1

United States District Court
Northern District of Illinois
Eastern Division

MINUTE ORDER

Judge Assigned:	Charles P. Kocoras
Case Number:	89-C-7753
Date:	March 8, 1991
Case Title:	Lim -v- Central DuPage Hospital et al

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ✖ Judgement is entered as follows (2) Other docket entry

Judgment is entered as follows: Ruling held. Enter Memorandum Opinion: CDH defendants' motion for entry of final judgment is granted. There being no just reason for delay, final judgment as to CDH defendants is hereby granted.

(12) ✖ For further detail see ✖ order attached to the original minute order forms
✖ Docketing to mail notices
✖ Mail AO 450 FORM

Appendix H-2

United States District Court
Northern District of Illinois
Eastern Division

No. 89-C-7753

JIT KIM LIM, M.D.	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CENTRAL DU PAGE HOSPITAL, a corp.	)	
HEALTHCORP AFFILIATES, a corp.,	)	
DAVID FOX, GEORGE HOLZHAUER,	)	
WENDELL FINKBEINER, PETER	)	
BRUSCA, M.D., RAYMOND	)	
DIETER, M.D., DAVID BARRETT,	)	
M.D., MUHAMMAD	)	
SHARIF, M.D., ROBERT WILSON, M.D.,	)	No. 89 C 7753
JEFFREY JOHNSON, M.D., DENNIS	)	
BAKER, M.D., JAMES O'BRIEN, M.D.,	)	
VINCENT SACKETT, M.D. RENATO	)	
IMANA, M.D., HARB BOURY, M.D.,	)	
DOUGLAS B. MAINS, M.D., RONALD	)	
M. SEVERINO, M.D., J. GEORGE	)	
HANDLEY, M.D., RICHARD	)	
NIEDBALLA, M.D., RICHARD MEYER,	)	
M.D., NEIL AGRUSS, M.D., RICHARD	)	
DOMINGUEZ, M.D., JAMES GRISSOM,	)	
M.D., DONALD GUSTAFSON, M.D.	)	

JOHN A HEITZLER, M.D., MONA KEA SOUTH ENTERPRISES, INC., a corp., MONA KEA LEASING ASSOCIATION, a corp., MONA KEA OWNERS ASSOCIATION, a corp., and MONA KEA SOUTH PROFESSIONAL CONDOMINIUM ASSOCIATION, a corp.,

Defendants.

Charles P. Kocoras, District Judge

MEMORANDUM OPINION

This motion comes before the court on Defendants Central DuPage Hospital, Healthcorp Affiliates, David Fox, George Holzhauer, Peter Brusca, Raymond Dieter, David Barrett, Muhammed Sharif, Robert Wilson, Angelo Sorce, Donald White, William Petrando, Jeffery Johnson, Dennis Baker, James O'Brien, Vincent Sackett, Rento Imana, Harb Boury, George Handley, Richard Niedballa, Richard Meyer, Neil Agruss, Wendell Finkbeiner, and John Heitzler's ("the CDH defendants") motion for entry of final judgment pursuant to Federal Rule of Civil Procedure 54(b). For the following reasons, the motion is granted.

BACKGROUND

Prior to August 25, 1986, the plaintiff, a neurosurgeon, was on staff at Defendant Central DuPage Hospital ("CDH"). On that day CDH suspended the plaintiff's medical staff privileges,

claiming that it had found a series of abnormalities in the plaintiff's record of patient care. Feeling that the real reason for the suspension was his having entered into a medical services business with a chiropractor, the plaintiff filed suit in this court against the CDH defendants.

This court dismissed the plaintiff's complaint on January 15, 1988. The Seventh Circuit affirmed this ruling on March 24, 1989, Lim v. Central DuPage Hospital, 871 F.2d 644 (7th Cir. 1989). Significantly, on October 16, 1989, the plaintiff filed the present action based on substantially the same facts as the 1986 action. In his new complaint the plaintiff again named the CDH defendants, in addition to some new defendants, and added new claims.

On December 5, 1990 this court entered an memorandum opinion dismissing all of the plaintiff's claims against the CDH defendants. Specifically, we found that the-plaintiff's anti-trust and RICO counts were barred under the doctrine of res judicata. In addition, we found that without the federal claims, this court lacked jurisdiction to hear the plaintiff's state law claims against these defendants. However, we did not dismiss the litigation against the non-moving defendants.

DISCUSSION

In support of their motion, the defendants argue that no interest of justice is served by allowing the threat of this litigation to hang over these defendants' heads. We gave the plaintiff until February 8, 1991, to file a response to this motion. However, the plaintiff has failed to respond. The question this court must address is whether there is any just reason for delay in entering final judgment dismissing these defendants from this case.

To begin, Rule 54(b) states in pertinent part, "When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b).

Upon reviewing the facts of this case, we can find no just reason to delay entry of final judgment as to the moving defendants. The plaintiff has no existing claims against them and their presence is no longer required for adjudication of the plaintiff's existing claims. On February 1, 1991, this court gave the plaintiff leave to file a motion for reconsideration of our December 5, 1990 opinion. However, the plaintiff has failed to file that motion. Therefore, we find no reason to delay final judgment as to the moving defendants. Accordingly, the defendants' motion is granted.

Charles P. Kocoras
United States District Judge

Dated: March 8, 1991

Appendix H-6

United States District Court
Northern District of Illinois
Eastern Division

No. 89-C-7753

JIT KIM LIM, M.D.	)
Plaintiff,	)
	)
CENTRAL DUPAGE HOSPITAL et al	)
	)
Defendants	)

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

✖ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that there being no just reason for delay, final judgment is hereby entered as to defen-

dants Central DuPage Hospital, Healthcorp Affiliates, David Fox, George Holzhauer, Peter Brusca, Raymond Dieter, David Barrett, Muhammed Sharif, Robert Wilson, Angelo Sorce, Donald White, William Petrando, Jeffery Johnson, Dennis Baker, James O'Brien, Vincent Sackett, Rento Imana, Harb Boury, George Handley, Richard Niedballa, Richard Meyer, Neil Agruss, Wendell Finkbeiner and John Heitzler, and against plaintiff. Cause is dismissed as to above named defendants, and judgment is entered accordingly.

March 8, 1991
Date

H. STUART CUNNINGHAM
Clerk

_____
(By) Deputy Clerk

Appendix I-1

United States District Court, Northern District of Illinois, Eastern Division

MINUTE ORDER

Name of Assigned Judge	Charles P. Kocoras
Case Number	89-C-7753
Date	July 23, 1991
Case Title	Lim -v- Central DuPage Hospital et al

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(10) ✖ Other docket entry

Enter Memorandum Opinion: Plaintiff's motion to vacate this court's ruling of December 5, 1990 is denied. Certain defendants' motion to dismiss plaintiff's complaint against them is granted. final judgment entered.

(11) ✖ For further detail see ✖ order attached to the original minute order forms
✖ Docketing to mail notices

In the
United States District Court
For the Seventh Circuit

No. 89-C-07752

DR. LEONARD J. CHINNICI. D.C..
Plaintiff,

v.

Central DuPage Hospital, et. al.,

Defendants.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the court on two motions. First, Plaintiff Lim moves to vacate this court's ruling of December 5, 1990. In addition, certain defendants move to dismiss the plaintiff's complaint against them. For the following reasons, the plaintiff s motion is denied and the defendants' motion is granted.

BACKGROUND

Prior to August 25,1986 the plaintiff, a neurosurgeon, was on staff at Defendant Central DuPage Hospital ("CDH"). On at day CDH suspended the plaintiff's medical staff privileges, ostensibly on the ground that it had found a series of abnormalities in the plaintiff's record of patient care. Plaintiff felt the reasons given for hat in effect was his dismissal were merely pretextual and filed suit in this court on the very day the decision became final.

Plaintiff's original 1986 complaint was grounded solely in federal anti-trust law. Comprised of a single count, it alleged that the real reason behind the plaintiff's suspension was that he had entered into a medical services business wit a chiropractor named Leonard Chinnici. Plaintiff named as defendants not only CDH but the physicians at CDH involved in the suspension as well, arguing that they had all conspired to deprive him of federal economic rights as guaranteed by the Sherman and Clayton anti-trust acts. (The plaintiff later added a second count alleging violations of the Illinois procedural rules governing peer review. This claim was abandoned somewhere along the course of the litigation.)

Two days after the suit was filed, however, the Seventh Circuit handed down its decision in Ezpeleta v. Sisters of Mercy Health Corporation, 800 F.2d 119 (7th Cir. 1986). Ezpeleta was the latest in a series of decisions in which the Seventh Circuit had concluded "that actions taken within the Indiana medical peer review process that result in the suspension of staff privileges are exempt from federal anti-trust law under the state action doctrine. " Id. at 121. The Seventh Circuit further stated that the state action rule enunciated in these cases was now so clear that

further complaints propounding this theory of liability were to be deemed frivolous, thereby making the lawyers responsible for filing them vulnerable to Rule 11 sanctions. Id. at 122.

On the basis of this line of authority and in particular Ezpeleta, the defendants moved to dismiss the anti-trust claims as failing to state a cause of action. They argued that the Illinois statutory peer review procedures involved at least as much state involvement as those of Indiana, thus immunizing any actions taken therunder from anti-trust liability.

Realizing the strength of Ezpeleta and its forebears, and concerned about the possible imposition of sanctions, the plaintiff chose to withdraw his anti-trust claims, thereby mooting the motion to dismiss. In their place, the plaintiff put claims of racial discrimination under various provisions contained in the Civil Rights Acts.

Defendants again moved to dismiss under Rule 12(b)(6), this time arguing that the plaintiff had no protectable property interest in his postital staff privileges. We agreed and, on January 15, 1988, dismissed the complaint. Judgment was entered against the plaintiff one week later on January j22, 1988.

Plaintiff promptly appealed to the Seventh Circuit. shortly after he filed his opening brief, however, the United States Supreme Court decided Patrick v. Burget, 486 U.S. 94, 108 Ct. procedural supervision that occurs in the average peer review immunity under Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307 (1943). Thus, the result of the decision in Patrick was that the Expeleta approach to state action was effectively overrulled, thereby eliminating the legal barrier which the plaintiff believed stood in the way of this anti-trust claims plaintiff believed stood in the way of his anti-trust claims.

Plaintiff thus found himself on appeal defending the legal sufficiency of racial discrimination claims, which were only added as an afterthought to preserve some sort of legal cause of action. His preferred anti-trust claims, which were now clearly colorable after Patrick, had been dropped over a year ago. In light of the Patrick decision, the plaintiff moved before the Seventh Circuit to have his case remanded to the trial court in order that he might re-establish his anti-trust claims.

No oral argument was heard on this motion, and on March 24, 1989, the Seventh Circuit issued its decision in Lim v. Central DuPage Hospital 871 F.2d 644 (7th Cir. 1989). The panel affirmed this courts dismissal of the plaintiff's racial discrimination claims, thereby disposing of all the claims which the plaintiff had substituted for the abandoned anti-trust claims. The Seventh Circuit subsequently denied the plaintiff's petition for a rehearing en ban on May 15, 1989, and the judgment in the 1986 lawsuit became final for all purposes when he failed to seek further review in the United States Supreme Court.

On October 13, 1989 the plaintiff filed a motion to vacate this court's January 15, 1988 final judgment. Citing Rule 60(b)(6) of the Federal Rules of Civil Procedure, the plaintiff argued that the dramatic change in Seventh Circuit anti-trust law worked by Patrick constituted an extraordinary circumstance warranting the opening ox these proceedings for the purpose of repleading the lost anti-trust claims.

Three days later, on October 16, 1989, the plaintiff filed the present action based on substantially the same facts as the 1986 action. In addition to the anti-trust claims, this action asserts a civil RICO and pendent state law tort claims, and names more defendants (the "Mona Kea Defendants"). The plaintiff alleges

in his new suit that these doctors, who had offices at Mona Kea Medical Park, coerced Dr. Lim into discontinuing his association with the chiropractor at his Mona Kea office.

On February 22, 1990 we denied plaintiff's motion to vacate the judgment entered against him on January 22,1988. We found the granting of Rule 60(b) relief inappropriate as the plaintiff had failed to follow available procedures before the Seventh Circuit to amend his complaint to replead the anti-trust claims. The plaintiff appealed to the Seventh Circuit. However, the appeal was dismissed on August 31, 1990 for want of prosecution.

In March, 1990 the defendants who had been parties to the earlier suit (the "CDH Defendants") moved to dismiss the plaintiff's new suit. This motion was mooted on August 17, 1990 when this court granted plaintiff leave to file an amended complaint. Thereafter, the CDH Defendants again moved to dismiss plaintiff complaint. The plaintiff s filed no response to defendant's second motion to dismiss.

On December 5, 1990 we found the plaintiff's new suit barred by res judicata. The plaintiff made no motion to reconsider and/ or vacate the ruling despite this court's granting the plaintiff leave to do so on February l, 1991. The CDH Defendants moved for final judgment on the December 5, 1990 ruling. Again, the plaintiff failed to file a response, despite two prior briefing dates set by the court. On March 18, 1991 we entered final judgment, formally dismissing the CDH Defendants from this case. Now, four and a half months after the December 5, 1990 ruling, the plaintiff moves to vacate or reconsider that ruling.

DISCUSSION

1. Motion for Reconsideration

In support of his motion for reconsideration, the plaintiff contends that the courts' December 5,1990 ruling was based on a misunderstanding of the facts. The CDH Defendant respond that the plaintiff's four and a half month delay in attempting to correct any alleged errors is inexcusable. In addition, the defendants argue that the plaintiff was given a full and fair opportunity to litigate his anti-trust claims, but failed to do so. We agree with the defendants on both points.

The plaintiff claims to have a 59(e) motion concerning this courts' March 8, 1991 final judgment ruling. However the plaintiff's motion focuses on our reasoning in the December 5, 1990 opinion and requests a rehearing and reinstatement of his claims against the CDH defendants, which were initially dismissed in the December 5th ruling. Therefore, we believe that the plaintiff is actually requesting an untimely reconsideration of the December 5, 1990 decision.

Generally, motions to reconsider are properly characterized as motions under Federal Rule of Civil Procedure 59(e), which governs motions seeking to alter or amend a judgment, rather than under Federal Rule of Civil Procedure 60(b), which governs motions seeking relief from a judgment or order. A.D. Weiss Lithography Co. v. Illinois Adhesive Products Co., 705 F.2d 249, 250 (7th Cir. 1983). A motion for reconsideration under Rule 59(e) must be filed within ten days, and the period

cannot be extended. Fed. R. Civ. P. 60(b): Bernstein v. Lind-Waldock Co., 738 F.2d 179,182 (7th Cir. 1984). As a Rule 59(e) motion, the plaintiff's present motion to reconsider is untimely.

On the other hand, Rule 60(b) permits relief for "any reason justifying relief from the operation of the judgment." Relief under this residual clause is available when reasons (1) through (5) are inapplicable, and equitable action is appropriate to accomplish Justice. Klapprott v. United States, 355 U.S. 601, 614-15 (1949). That is, the movant's reason must justify relief. Peacock v. Board of School Comm'rs of he City of Indianapolis, 721 F.2d 210, 214 (7th Cir. 1983). Under Rule 60(b) we find no equitable reason justifying relief from the December 5th ruling.

First, on September 10, 1990 the CDH Defendants filed a motion to dismiss the plaintiff's amended complaint. Plaintiff filed no answer. Now, the plaintiff's argues that the court should have relied on his June 14, 1990 response to a earlier, mooted motion to dismiss. After the December 5,1990 ruling the plaintiff neglected to file a motion for alteration or reconsideration of the ruling, though the court gave him leave to do so. When the CDH Defendants requested final judgment on the December 5th ruling, the plaintiff's again failed to file a response.

The CDH Defendants have filed their motions and briefs on these issues on a timely, good-faith basis. The plaintiff has filed two cases, five separate complaints, two appeals, and numerous motions to reconsider and/

or vacate. At some point if is unfair to require the defendants to repeatedly renew their defense in a case which they reasonably believed to be closed against them. We feel that the plaintiff's case against the CDH Defendants has reached that point.

In addition, we find that the plaintiff was offered a full and fair opportunity to litigate his anti-trust claim in his prior 1986 action, but neglected to take full advantage of the opportunity. The "full and fair opportunity to litigate" requirement concerns the procedural opportunity the claimant had to assert the claim sought to be barred by res judicata. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481-5 (1982). The procedural opportunity to assert a claim needs do no more than satisfy the minima procedural requirements of the due process clause. Id. at 481. Only when there is "reason to doubt the quality, extensiveness or fairness of procedures followed in prior litigation" should the "full and fair opportunity to litigate" requirement be invoked to bar the application of res judicata. Id.

Dr. Lim originally included in his 1986 complaint an anti-trust claim. When Ezpeleta was decided the plaintiff was not required to withdraw is anti-trust claim since his claim had been filed in good faith prior to the Ezpeleta decision. In addition, Ezpeleta applied to the Indiana peer review system, which is arguably different from the Illinois system. Rather than withdraw the claim, the plaintiff could have waited to have the issue resolved on its merits by this court, and thereby properly preserve his claim for later motion or appeal.

Moreover, even though there were adequate procedural safeguards afforded the plaintiff to reinstate his anti-trust claim before the Seventh Circuit, he neglected to take full advantage of them, resulting in his failure to obtain leave to reinstate his previously abandoned anti-trust claim. When the Patrick decision was issued the plaintiff did file a motion before the Seventh Circuit to have his case remanded to the trial court for addit-ion of the antitrust claims. However, there was apparently no oral argument before the Seventh Circuit on the plaintiff's motion to remand and/or reinstate, and the Seventh Circuit noted in its decision affirming the dismissal, the "'[a]bandonment of claims is a leitmotif of this appeal." Lim, 871 F.2d at 646 Based on the history of this case, we affirm our original finding that the plaintiff's action against the CDH Defendants is barred by res judicata. Accordingly, the plaintiff's motion for reconsideration is denied.

2. **Motion to Dismiss**

Now come the Defendants, Richard Dominguez, M.D., James H. Grissom, M.D., Donald Gustafson, M.D., Mona Kea South Enterprises, Inc., Mona Kea Leasing Association, Mona Owners Association, and Mona Kea South Professional Condominium Association (the "Mona Kea Defendants") moving to dismiss the plaintiff's claims against them. The defendants assert that the plaintiff's claims against them are also barred by res judicata. In addition, the defendants assert that the plaintiff fails to allege a pattern of racketeering activity under the RICO Statute, the anti-trust and RICO claims

are barred by the statute of limitations, and the conspiracy allegations fail to state a cause of action. In response, the plaintiff argues that his claims are not barred by res judicata or the statute of limitations. In addition, he asserts that his RICO claim clearly establishes extortionate acts and a patter of racketeering and hi conspiracy claim is sufficiently pled.

a. Res Judicata

It response to the Mona Kea Defendants' res judicata argument the plaintiff asserts that he did not have a full and fair opportunity to litigate his claims in his earlier suit. We disagree for the reasons discussed above. Next, the plaintiff argues that the Mona Kea defendants lack privity to the defendants in the earlier suit. Again, we disagree.

To begin, under the doctrine of res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U.S. 90, 94, 101 S. Ct. 411, 414 (1980); See also Donovan v. Estate of Fitzsimmons, 778 F.2d 298, 301 (7th Cir. 1985). Strict identity of the parties is not required to achieve privity. Privity also applies to successive parties who represent the same legal interests. Donovan, 778 F.2d at 301; See also TRW, Inc. v. Ellipse Corp., 495 F.2d 314, 317-18 (7th Cir. 1974). The question that re-

mains here is whether the Mona Lea defendants have the same legal interests as the parties in the 1986 suit.

First, in his original 1986 complaint Lim alleged that defendants Ronald M. Severino, M.D. and Douglas B. Mains, M.D. "were respectively the President of the Mona Kea South Professional Condominium Association and President of the Mona Kea Owners Association. . ." and physicians on staff at Central DuPage Hospital. Lim went on to allege that solely because of his association with a chiropractor at the Mona Kea Medical Park, these two doctors conspired with others doctors on staff at Central DuPage Hospital "to ostracize and destroy the Plaintiff's medical practice," and instituted a "sham audit and investigation of the plaintiff's surgical cases at Central DuPage Hospital" which resulted in suspension of the plaintiff's privileges at the hospital.

Next, the plaintiff's second amended complaint in the 1986 suit alleged that Drs. Mains and Severino induced other doctors having offices and practices at Mona Kea Medical Park to decline referring patients to the plaintiff and stop serving patients referred by the plaintiff. The plaintiff also alleged that these two doctors attempted to change the Mona Kea condominium by-laws to exclude chiropractors from practicing there.

Similarly, the plaintiff's 1989 suit alleges that solely because of his association with a chiropractor, doctors at Central DuPage Hospital conspired to suspend the plaintiff's privileges at the hospital. The plaintiff also alleges that because of his association with a chiropractor, Drs. Main and Severino, along with newly named doctors at Mona Kea Medical Park, conspired to force the plaintiff to discontinue his association with the chiropractor and conspired to change the condominium by-laws and covenants to wrongfully exclude chiropractors. In sum the allegations in the 1986 suit and the 1989 suit are substantially the same and center around Dr. Lim's association with a chiropractor.

The Mona Kea Defendants assert that in the 1986 suit Drs. Main and Severino had a legal interest in upholding the condominium's lawful restrictive covenant against chiropractors at Mona Kea Medical Park. The defendants also contend that Drs. Main and Severino had an interest in freedom of association, that is, their right to limit their business association to medical doctors. We find that in the present suit the Mona Kea Defendants have precisely the same legal interests as Drs. Main and Severino had in the 1986 suit. Therefore, the Mona Kea Defendants stand in privity to the defendants in the 1986 suit and the doctrine of res judicata applies to bar the plaintiff's suit against the Mona Kea Defendants.

b. RICO Pattern of Racketeering

We also find that the plaintiff's failure to satisfy the pattern of racketeering requirements for RICO claims affords an independent basis to dismiss the plaintiff's RICO claim. "A crucial element of a section 1962 claim... is the existence of a pattern of racketeering activity." Elliott v. Chicago Motor Club Ins. 809 F.2d 347, 349 (7th Cir. 1986).

To establish a pattern the plaintiff must assert more than one racketeering activity and the threat of continuing activity. Sedim, S.P.R.L. v. Imrex Co., 473 U.S. 479, 105 S. Ct. 3275, 3285 n. 14 (1985). Whether a pattern exists in any given situation is a fact-specific question hinging on a number of relevant factors. Jones v. Lampe, 845 F.2d 755, 757 (7th Cir. 1988). The Seventh Circuit has held that four factors should be considered in making the determination: "(1) the number and variety of the predicate acts and the length of time over which they were committed; (2) the number of victims; (3) the presence of separate schemes; and, (4) the occurrence of distinct injuries.". Triad Associates, Inc. v. Chicago Housing Authority, 892, F.2d 583, 594 (7th Cir. 1989). See also Liquid Air Corp. v. rogers, 834 F. 2d 1297, 1304 (7th Cir. 1987) and Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1989).

Significantly, the Seventh Circuit has held that a single fraudulent scheme with only one injury to one victim is not a "pattern of racketeering activity" for purposes of §1962(c) simply because it involved several acts of mail and wire fraud to inflict a single injury. Lipin Enterprises, Inc. v. Lee, 803 F.2d 322, 324-5 (7th Cir. 1986). See also Tellis v. United States Fidelity & Guar. Co., 8226 F.2d 477, 478 (7th Cir. 1986 (multiple acts of mail fraud involving only one victim and relating to only one basic transaction cannot constitute the necessary pattern for a CO claim). It is under these precedents that Lim's RICO claim fails.

Lim asserts that between April and October 1985 the Mona Kea Defendants engaged in four overt acts intend to intimidate h into discontinuing hi relationship with Dr. Chinicci: (1) a April 1985 cease *and* desist letter and meeting; (2) a June 1985 survey and extreme displeasure letter; (3) a September 26, 1985 amendment to the Declaration of Condominium; and (4) recordation of the amendment. These allegations assert that the plaintiff is the sole victim of but one alleged scheme, a scheme to coerce him into disassociating himself from practicing medicine with a chiropractor at Mona Kea Medical Park. Under Lipin and Tellis such allegations are insufficient to establish a pattern of racketeering activity, even though the plaintiff alleges more than one mailing.

Moreover, the plaintiff fails to assert a threat of continuing racketeering activity. Once the dissociation was achieved the motivation for the defendants conduct terminated and the alleged wrongful conduct was discontinued. In sum, we find that the plaintiff's RICO claim must also fail for failure to establish a pattern of racketeering activity. Accordingly, the defendants' motion is granted and the plaintiff's claims against them are dismissed.

Charles P. Kocoras
United States District Judge

Dated: July 23, 1991

United States District Court, Northern District of Illinois, Eastern Division

JUDGMENT IN A CIVIL CASE

Judge Assigned:	**Charles P. Kocoras**
Case Number:	**89-C-7753**
Date:	**July 23, 1991**
Case Title:	**Lim -v- Central DuPage Hospital et al**

☐ **Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.**

☒ **Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.**

IT IS ORDERED AND ADJUDGED that the plaintiff's motion to vacate the court's order of December 5, 1990 is denied. Plaintiff's claims against all defendants are hereby dismissed. Judgment is hereby entered in favor of all defendants and against plaintiff.

July 23, 1991
Date

H. Stuart Cunningham
Clerk

Appendix J-1

In the
United States District Court
For the Seventh Circuit

No. 89-C-07752

DR. LEONARD J. CHINNICI. D.C.,
Plaintiff,

v.

CENTRAL DuPAGE HOSPITAL ASSOCIATION, a corporation, MONA KEA SOUTH PROFESSIONAL CONDOMINIUM ASSOCIATION, a corporation, MONA KEA OWNER'S ASSOCIATION, a corporation, PETER A. BRUSCA, M.D., RAYMOND DIETER, M.D., DAVID BARRETT, M.D., MUHAMMAD SHARIFF, M.D., ROBERT WILSON, M.D., ANGELO SORCE, M.D., DONALD WHITE, M.D., WILLIAM PETRANDO, M.D., JEFFREY JOHNSON, M.D., DENNIS BAKER, M.D., JAMES O'BRIEN, M.D. VINCENT SACKETT , M.D., RICHARD NEIDBALLA, M.D., RICHARD MEYER, M.D., NEIL AGRUSS, M.D., J. GEORGE HANDLEY, M.D., RENATO

IMANA, M.D., HARB BOURY, M.D.
DOUGLAS B. MAINS, M.D.,
RONALD SEVERINO, M.D.,
RICHARD DOMINGUEZ, M.D.
and the unknown individuals who
were Directors of Central DuPage
Hospital on the relevant dates,

Defendants.

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

The plaintiff, Leonard Chinnici, has brought this amended five count action seeking damages and injunctive relief under the Racketeer Influenced and Corrupt Organizations Act, ("RICO"), anti-trust laws, and state law. Certain defendants have moved to dismiss the RICO claims (Counts I and II) for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). These defendants, collectively referred to as the "CDH" defendants include: the Central Dupage Hospital Association and doctors Neil Agruss, Dennis Baker, David Barrett, Herb Boury, Peter Brusca, Raymond Dieter, J. George Handley, Renato Imana, Jeffrey Johnson, Richard Meyer, Richard Neidballa, James O'Brien, William Petrando, Vincent Sackett, Muhammad Shariff, Angelo Sorce, Donald White, Robert Wilson.[1] For the following reasons, the defendants' motion is

---

[1]Defendants who are nor party to the motion to dismiss include the Mona Kea South Professional Condominium Association, the Mona Kea Owners Association, doctors Douglas B. Mains, Ronald Severino, Richard Dominguez and various unnamed directors of the Central DuPage Hospital.

denied, except that it is granted with respect to Chinnici's claim for injunctive relief under RICO.

BACKGROUND

Chinnici maintains the following factual allegations in support of his complaint.[2] In December, 1984, Chinnici, a chiropractor, entered into an agreement with Dr. Jit Kim Lim to refer patients to each other, to consult together, and share office space at their respective offices in connection with a business they called the neuro-spinal center.' Complaint at ¶13-14; Exhibit A. Lim, a staff member of the Central DuPage Hospital, owned a condominium at the Mona Kea South Professional Park where his office was located. During the summer of 1985, the defendant Severino, and other members of Mona Kea and the Central DuPage hospital staff requested that Lim terminate his relationship with Chinnici and told him that no good would come to him from association with a chiropractor. Id. at ¶15. On April 5, 1985, the defendant Mains, who was the President of the Mona Kea Owners' Association called a special meeting regarding ~chiropractic occupancy at Mona Kea- Id. at ¶16; Exhibit B. Subsequently, Lim received a letter from Severino on April 9, 1985 informing him that he was in violation of Article VII, § 7.01(a) of the Declaration of Condominium Ownership for Mona Kea and that he must "cease and desist . . . the utilization of all or any portion of Unit 511 B in Mona Kea South for the administration, consultation, or performance of chiropractic services." Id. at ¶17; Exhibit C. In the Association

[2]For the purpose of this motion to dismiss under Fed.R.Civ.P. 12(b)(6), we must assume the truth of all well-pleaded factual allegations in Chinnici's complaint and draw all reasonable inferences therefrom. Wolfolk v. Rivera 729 F.2d 1114, 1116 (7th Cir. 1984). We shall only consider those allegations found in Counts I and II of the amended complaint.

meeting that followed, Lim claimed that his association with Chinnici was not in violation of the Declaration, but all other members voted to uphold the "cease and desist" notice. Id. at ¶18; Exhibit D.

Chinnici further alleges that the defendants' agreed among themselves to spread rumors among the medical staff of the Central DuPage Hospital disparaging Lim's professional competency and ethics in order to cause Lim to terminate his association with Chinnici. Id. at ¶19. Chinnici claims that on or around May 1985, certain members of CDH posted an advertisement of the "neuro-spinal center" in a derogatory fashion asserting professional misconduct by Lim. Id. at ¶20.

The defendants, Severino and Mains, wrote to Lim on June 7, 1985, expressing displeasure on behalf of the condominium owners with his alliance with Chinnici and again requesting him to discontinue his partnership. On September 10, 1985, the owners of Mona Kea voted to amend Article VII § 7.01(a) to specifically exclude and prohibit "the occupation, ownership or rental of a Unit by Chiropractors and Napropaths." Id. at ¶22; Exhibit F. The members of CDH and Mona Kea then began to cut off patient referrals to Lim-described by Chinnici in his complaint as a "professional boycott." Id. at ¶23. As a result, the number of referrals from Lim to Chinnici decreased. Id. at ¶24. Chinnici also claims that Lim was subjected to a surgical audit of his neurosurgical cases by CDH which described certain irregularities that were satisfactorily addressed by Lim. Id. at ¶26. According to Chinnici, Lim's staff privileges at the Central DuPage Hospital were then suspended without cause on March 24, 1986, and on August 25, 1986, the Board of Governors or CDH voted to permanently suspend Lim's staff privileges, presumably because his association with a chiropractor was against CDH policy. Id. at ¶27-29; Exhibit H. In the end, Lim

terminated his agreement with Chinnici in a letter on January 10, 1986, pursuant to Section 2 of their agreement. Exhibit G.

DISCUSSION

In order to state a claim under RICO, Chinnici must have alleged facts sufficient to show a "pattern of racketeering activity," that is, two predicate acts or threats "involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotics or other dangerous drugs." 18 U.S.C. §1961 (1),1961 (5), 81962 There must be both "continuity" and "relationship" among these predicate acts for the pattern requirement to be met. Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986). The enterprise engaged in these activities must also have affected interstate commerce which resulted in injury to the plaintiff's business or property. Marcial v. Coronet Insurance Co., 880 F.2d 954 (7th Cir. 1989). See also, Sedima. S.P.R.L v. Imrex Compan, 473 U.S. 479, 496,105 S.Ct. 3275 (1985).

Chinnici generally asserts that the defendants engaged in multiple acts of extortion in violation of 18 U.S.C. § 1951 and applicable state law which caused Lim to relinquish "his medical practice, the use of his condominium space at Mona Kea, and his right to associate with a chiropractors." Complaint at ¶43. Although Chinnici claims that the extortionate acts were directed at Lim and Chinnici jointly, the defendants' activity, he argues, is part of a larger illegal interstate enterprise against licensed chiropractors by the medical profession. Id. at ¶39-43.

In support of their motion to dismiss the RICO counts, the CDH defendants contend that Chinnici (1) lacks standing to bring a RICO action, (2) has failed to plead a pattern of racketeering

activity, and (3) has failed to plead predicate acts of extortion.[3] Regarding the first two arguments and assuming for the moment that the alleged actions of the defendants amounted to predicate acts of extortion, we find that Chinnici's allegations are sufficient to support both his standing to bring the RICO claims and to state a pattern and practice of racketeering activity. First, the allegations clearly support the conclusion that the principal objective of the CDH defendants' contend was to injure the business relationship between Lim and Chinnici, thereby to ensure that Chinnici would not be able to benefit from associating with Lim and sharing Lim's condominium space at Mona Kea The fact that the defendants may have sought to realize that objective by directing allegedly extortionate threats only at Lim, the party over whom they had the greater power to influence, does not render the nature of Chinnici's injury only secondary as the CDH defendants contend.

Second, the United States Supreme Court has noted in discussing the definition of a "pattern of racketeering activity" that [t]he infiltration of legitimate business normally requires more that one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." Sedima. S.P.R.L v. Imrex Co.. 473 U.S. 479, 496,105 S.Ct 3275, 3285 n.14 (1985). It is undisputed that Chinnici has alleged at least one racketeering activity, or scheme-that of extorting Lim to cut

[3]The CDH defendants also contend that in both Counts I and II, Chinnici has improperly requested injunctive relief which they claim is not available to private parties under civil RICO. Chinnici has not contested this assertion, and accordingly we dismiss Chinnici's claims for injunctive relief in these counts. However, contrary to the CDH defendants' odd assertion at pages 14 and 15 of their memorandum, the dismissal of the claims for injunctive relief does not provide an alternate basis for dismissal of the claims in their entirety.

off his business relationship with Chinnici.[4] Further, it cannot be seriously disputed that Chinnici has sufficiently alleged a threat of continuing activity on the part of the CDH defendants. Chinnici has incorporated into his complaint several exhibits, among which, for example, is a letter to Lim from the presidents of both the Mona Kea Professional Condominium Association and the Mona Kea Owners Association stating in part

> In our opinion your partnership with Dr. Chinnici reflects poorly on Mona Kea Medical Park and the physicians who practice here. It is our intent to take whatever steps are necessary to discourage other Chiropractors from practicing at Mona Kea
>
> You should also know that the Central DuPage Hospital Medical Staff has been notified of your present association with Doctors of Chiropractic.

We further find that, for the purposes of withstanding a motion to dismiss, Chinnici has sufficiently alleged the existence of other predicate acts committed by the CDH defendants or other doctors and medical groups with whom the CDH defendants were associated. Chinnici has alleged that all of these persons and entities were members of a larger enterprise of various groups in the medical profession organized to coerce medical

---

[4]We do not accept Chinnici's argument that we treat this as two separate schemes based on the contention that both he and Dr. Lim were victims and each of them suffered distinct injuries. We view the scheme as singly targeted at the Lim/Chinnici partnership, with the acts of extortion directed at one of the partners resulting in injury to both.

doctors not to associate with chiropractors. See, e.g.. Complaint at ¶37.[5]

We now turn to the question as to whether Chinnici has sufficiently plead predicate acts of extortion. Chinnici specifically relies on the federal law of extortion contained in the Hobbs Act, which states in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section--
>
> * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. §1951 . Chinnici also indicates in his complaint that he intends to rely on "applicable state law" as another basis for

---

[5]Of course, to the extent Chinnici relies on predicate acts allegedly committed against others by persons or entities who are not parties to this action, Chinnici must ultimately establish a link between the CDH defendants and those persons.

the substantive law underlying his RICO claim, yet he fails to specify the particular provision of state law upon which he will rely. In their motion to dismiss, the defendants assert that the only possibly relevant state law to the circumstances alleged is the Illinois crime of "Intimidation." Ill.Rev.Stat., ch. 38 ¶12-6. Since Chinnici has not challenged that assertion, and has failed to provide any other state law basis for the predicate acts alleged, we shall limit our consideration of state law to the Illinois statute which defines in relevant part the crime of "Intimidation:"

(a) A person commits intimidation when, with intent to cause another to perform or to omit the performance of any act, he communicates to another, whether in person, by telephone or by mail, a threat to perform without lawful authority any of the following acts:

(7) Bring about or continue a strike, boycott or other collective action.

Chapter 38 § 12-6. Chinnici alleges that the following acts by the defendants amounted to violations of these statutes and therefore constitutes predicate acts for the purposes of RICO.:

1. Lim was asked to terminate his agreement with Chinnici because he was associating with a chiropractor.

2. The Mona Kea Condominium Association sent letters stating that Lim was acting in violation of the Association's by-laws and must discontinue his agreement with Chinnici.

3. The Mona Kea Condominium Association altered its by-laws to specifically exclude Chiropractors and Napropaths from practicing there.

4. Rumors were spread as to Lim's competency and ethics in order to cause Lim to end his agreement with Chinnici.

5. An advertisement of Lim's practice was posted in a derogatory fashion.

6. Patient referrals were cut off to Lim.

7. A surgical audit was conducted of Lim and his staff privileges were later suspended.

As a result of these actions, Lim terminated his agreement with Chinnici.

Looking first at federal law, we observe that the Hobbs Act recognizes three general categories of inducement which can result in extortionate interference of interstate commerce: (1) wrongful use of actual or threatened force or violence, (2) the color of official right, and (3) fear, "which in practice-when unassociated with force, violence or misuse of public office-has come generally to mean fear of economic harm." U.S. v. Sturm. 671 F.Supp. 79, 83 (D.Mass. 1987). Chinnici's allegations would properly come within the third category. Interpreting the word "wrongful" in the context of this third category, the Supreme Court has concluded that the word has meaning only if it limits the statutes' domain to instances where obtaining the property would itself be "wrongful" because the alleged extortionist has no lawful claim to the property. United States v. Enmons, 410 U.S. 396, 93 S.Ct. 1007 (1973).[6]

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[6]This interpretation of the Hobbs Act is therefore similar to the Illinois statute's requirement that an offender must have acted "without lawful authority" in order to be found culpable for the crime of intimidation in bringing about a strike, boycott or other collective action. Accordingly, our analysis of the issue under federal law will resolve our consideration of the issue under state law.

Operating under this definition of "wrongful," the Supreme Court has recognized that certain acts, such as union strikes, do not amount to a wrongful taking of property by denying someone an economic benefit, even though there may be fear that economic harm would result. Id. at 400, 93 S.Ct. at 1010. See also. United States v. Clemente, 640 F.2d 1069, 1077 (2d Cir. 1981), cert. denied, 454 U.S. 820,102 S.Ct. 102 (1981). Such activity is not wrongful so long as the strike is undertaken to obtain objectives recognized by law as being legitimate and, therefore, undertaken with lawful authority. Thus, a threat of economic harm standing alone will not constitute extortion. Accordingly, we must consider whether the CDH defendants were acting with or without lawful authority when they committed the acts about which Chinnici claims.

The essential economic threats allegedly posed by the defendants were a deprivation of Lim's use of the facilities at CDH, his unrestricted use of the condominium at Mona Kea, and the privilege of referrals from the doctors with whom he was associated.[7] When Lim joined CDH and Mona Kea, however, he voluntarily bound himself to abide by the rules and policies of those associations. Any association ordinarily has a right to limit membership and practice standards to secure the objectives of that society. Membership and its privileges accordingly may be conditioned upon the compliance of each

---

[7]We reject the CDH defendant's contention that these threats failed to put at risk "property" within the meaning of the Hobbs Act. Under the Hobbs Act the term "property" has been broadly construed to encompass intangible property and includes the right to make business decisions free from outside pressure wrongfully imposed. U.S. v. Lewis, 797 F.2d 358, 364 (nh Cir. 1986). In addition, the "property" at risk here is more tangible than one might at first suppose. For example, as Chinnici points out in his response, certainly hospital staff privileges are an economic necessity to physicians practicing in that locale.

member with the policies of that association. Thus, at first glance, it is not immediately apparent that any of the CDH defendants acted without lawful authority when refusing to refer patients to Lim and when threatening to take away his staff privileges and right to practice at Mona Kea Yet, the question as to whether the CDH defendants acted with lawful authority is not so easily resolved.

Because the use of fear of financial injury is not inherently wrongful, particularly under the circumstances alleged here in which the defendants apparently possessed certain authority to terminate their affiliation with Lim, the objective of the party employing fear of economic loss must additionally be considered on the issue of the lawfulness of its use. See Clemente, 640 F.2d at 1077. Chinnici supports his assertion that the doctors conduct was without lawful authority, and therefore criminally extortionate under the Hobbs Act, by placing their actions in the context of the recent ruling of the Seventh Circuit in Wilk v. American Medical Association. 895 F.2d 352 (7th Cir. 1990). In Wilk, the court determined that chiropractors had suffered civil antitrust injury from a boycott against them organized by a national medical association. At least for the purposes of surviving a motion to dismiss, Chinnici's reliance on Wilk is sound.

Although the CDH defendants may generally have had the authority to place and enforce restrictions upon their members and to condition continued membership upon faithful obedience to those policies, in essence, it has been alleged that the CDH defendants ultimately conditioned Lim's right to continue to practice at Mona Kea and to use the facilities at CDH on Lim's agreement to join with the CDH defendants in an illegal boycott of chiropractors. We believe that such a threat to

deprive a person of his right to use his condominium property and to use hospital facilities based on collectively imposed policies that are clearly violative of the anti-trust laws may be regarded as having been made "without lawful authority." Cf. Triad, 892 F.2d at 594 (dicta indicating a reluctance to conclude that the plaintiff had not sufficiently alleged predicate acts of mail and wire fraud under the civil RICO statute in light of the court's conclusion that a housing authority had an obligation under Illinois law to exercise its otherwise lawful contractual discretion in "good faith," and that the obligation may have been breached). Cf. also United States v. Covino, 837 F.2d 65 (2d Cir. 1988) (defendant found guilty under Hobbs Act for abusing his otherwise lawful power to deny economic benefits to a contractor by requiring the contractor to perform certain services and to pay cash to which the defendant was not entitled). Compare Peterson v. Philadelphia Stock Exchange, 717 F.Supp. 332 (E.D.Pa 1989) (denial of a stock trader's admission to stock exchange unless he paid outstanding debt not "wrongful" within the meaning of the Hobbs Act).

For Chinnici ultimately to prevail on his RICO claims, however, he will have to overcome several obstacles, not the least of which is proving that the CDH defendants, or other nondefendant members of the same enterprise acting in concert with the CDH defendants, actually engaged in a pattern and practice of similarly threatening other physicians with economic injury for their refusal to join in an unlawful boycott of chiropractors. We wish to make clear that proof merely of a pattern and practice of anti-trust violations will not suffice, since RICO requires predicate acts of extortion.[8]

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[8]In this respect, our holding avoids transforming every pattern of abuses of civil commercial law into predicate acts resulting in criminal liability under RICO.

CONCLUSION

The CDH defendants' motion to dismiss RICO Counts I and II is granted only with respect to Chinnici's claims for injunctive relief under RICO, and denied with respect to the remaining challenges. It is so ordered.

MARVIN E. ASPEN
United States District Judge

Dated: 7/2/90

(2)

Supreme Court, U.S.
FILED
FEB 22 1993
OFFICE OF THE CLERK

No. 92-1272

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JIT KIM LIM, M.D., *Petitioner,*

v.

CENTRAL DUPAGE HOSPITAL, HEALTHCORP AFFILIATES, DAVID FOX, GEORGE HOLZHAUER, WENDELL FINKBEINER, PETER BRUSCA, M.D., RAYMOND DIETER, M.D., DAVID BARRETT, M.D., MUHAMMAD SHARIF, M.D., ROBERT WILSON, M.D., ANGELO SORCE, M.D., DONALD WHITE, M.D., WILLIAM PETRANDO, M.D., JEFFREY JOHNSON, M.D., DENNIS BAKER, M.D., JAMES O'BRIEN, M.D., VINCENT SACKETT, M.D., RENATO IMANA, M.D., HARB BOURY, M.D., DOUGLAS B. MAINS, M.D., RONALD M. SEVERINO, M.D., J. GEORGE HANDLEY, M.D., RICHARD NIEDBALLA, M.D., RICHARD MEYER, M.D., NEIL AGRUSS, M.D., RICHARD DOMINGUEZ, M.D., JAMES GRISSOM, M.D., DONALD GUSTAFSON, M.D., JOHN A. HEITZLER, M.D., MONA KEA SOUTH ENTERPRISES, INC., MONA KEA LEASING ASSOCIATION, MONA KEA OWNERS ASSOCIATION, and MONA KEA SOUTH PROFESSIONAL CONDOMINIUM ASSOCIATION, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CENTRAL DUPAGE RESPONDENTS* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13pp

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QUESTION PRESENTED

Whether the Seventh Circuit correctly ruled that principles of *res judicata* barred plaintiff's second attempt to litigate the same claim notwithstanding the excuses plaintiff advanced for voluntarily abandoning his claim in the first proceeding.

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No. 92-1272

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JIT KIM LIM, M.D.,

Petitioner,

v.

CENTRAL DUPAGE HOSPITAL, HEALTHCORP AFFILIATES, DAVID FOX, GEORGE HOLZHAUER, WENDELL FINKBEINER, PETER BRUSCA, M.D., RAYMOND DIETER, M.D., DAVID BARRETT, M.D., MUHAMMAD SHARIF, M.D., ROBERT WILSON, M.D., ANGELO SORCE, M.D., DONALD WHITE, M.D., WILLIAM PETRANDO, M.D., JEFFREY JOHNSON, M.D., DENNIS BAKER, M.D., JAMES O'BRIEN, M.D., VINCENT SACKETT, M.D., RENATO IMANA, M.D., HARB BOURY, M.D., DOUGLAS B. MAINS, M.D., RONALD M. SEVERINO, M.D., J. GEORGE HANDLEY, M.D., RICHARD NIEDBALLA, M.D., RICHARD MEYER, M.D., NEIL AGRUSS, M.D., RICHARD DOMINGUEZ, M.D., JAMES GRISSOM, M.D., DONALD GUSTAFSON, M.D., JOHN A. HEITZLER, M.D., MONA KEA SOUTH ENTERPRISES, INC., MONA KEA LEASING ASSOCIATION, MONA KEA OWNERS ASSOCIATION, and MONA KEA SOUTH PROFESSIONAL CONDOMINIUM ASSOCIATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CENTRAL DUPAGE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REASONS FOR DENYING THE WRIT

THE SEVENTH CIRCUIT'S UNANIMOUS DECISION, AFFIRMING DISMISSAL ON *RES JUDICATA* GROUNDS OF PETITIONER'S SECOND ATTEMPT TO LITIGATE AN ANTITRUST CLAIM, IS BASED ON THE SOUND APPLICATION OF SETTLED LAW AND PRESENTS NO ISSUE MERITING FURTHER REVIEW BY THIS COURT.

Introduction

It is well established that a final judgment on the merits precludes subsequent litigation of issues which were or could have been raised in a prior suit involving the same transaction. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S. Ct. 2424, 2428 (1981). Petitioner does not dispute this settled principle and, as his own recitation of facts demonstrates, prior to filing the instant action he pursued two prior proceedings involving the same transaction, followed by two appeals. Those prior proceedings afforded petitioner ample procedural opportunities to present the antitrust claim asserted in this action.

Petitioner, however, *voluntarily* abandoned each of these prior opportunities. His continuing unwillingness to accept his own responsibility for the outcome of this latest proceeding, finally dismissing his claim on *res judicata* grounds, raises no important or unsettled question of law, and demonstrates no conflict among Courts of Appeal meriting further review by this Court. Rather, as the Seventh Circuit explained in affirming dismissal of petitioner's complaint:

> At some point, there must be an end to litigation, and barring the appellant's second suit on the ground of *res judicata* is an equitable method of upholding that policy. As the district court noted, "[t]he plaintiff has filed two cases, five separate complaints, two appeals [now three], and numerous motions to reconsider

> and/or vacate. At some point it is unfair to require the defendants to repeatedly renew their defense in a case which they reasonably believed to be closed against them." Dr. Lim's inability to litigate his antitrust claim is the result not of a deprivation of available process, but his counsel's failure to follow through with the full and fair opportunity that was available to him.

Lim v. Central DuPage Hospital, 972 F.2d 758, 764 (7th Cir. 1992). (*Lim II*) In short, petitioner's complaint that application of *res judicata* principles was not warranted under the facts of this case is contrary to the record.

A. Petitioner Asserted, Then Abandoned, His Antitrust Claim In The First Proceeding.

In August, 1986, petitioner filed a single count complaint alleging that the revocation of his staff privileges at Central DuPage Hospital violated Federal antitrust laws. *Lim II*, 972 F.2d at 760. Then, although no court had ever held that Illinois' peer review system involved sufficient state action to warrant exemption from the antitrust laws, petitioner decided that he would not prevail on this issue and voluntarily withdrew his antitrust claim. (Pet. App. I, p. 9)

Petitioner replaced the antitrust claim with an allegation that revocation of his privileges was motivated by race discrimination. When this claim was dismissed on the merits, petitioner appealed. *Lim v. Central DuPage Hospital*, 871 F.2d 644 (7th Cir. 1989). (*Lim I*) While that appeal was pending, petitioner had second thoughts about having abandoned his antitrust claim and, on the eve of oral argument, moved for leave to cite this Court's decision in *Patrick v. Burget*, 486 U.S. 94, 108 S. Ct. 1658 (1988), as additional authority requiring remand. (Pet. App. C, pp. 6-9)

Petitioner never pressed for a ruling on this motion, however, never filed a motion for leave to file an amended complaint, and never tendered an amended complaint as he should have to properly raise and preserve the issue. *See Cohen v. Illinois Institute of Technology*, 581 F.2d 658 (7th Cir. 1978), *cert. denied*, 439 U.S. 1135, 99 S. Ct. 1058 (1979); *Asher v. Harrington*, 461 F.2d 890 (7th Cir. 1972); *Bownes v. City of Gary, Indiana*, 112 F.R.D. 424 (N.D. Ind. 1986). After the Seventh Circuit affirmed dismissal of his race discrimination claim in *Lim I*, petitioner did not raise the issue in his petition for rehearing or seek review in this Court. As the Seventh Circuit explained in *Lim II*:

> Dr. Lim filed a request for remand four days before oral argument on his appeal, but he failed to respond to the defendants' arguments against remand, he failed to raise the issue during oral argument, and he failed to object to our sub silentio rejection of his request for remand in our opinion when he requested rehearing of his appeal.

Lim II, 972 F.2d at 763.

Petitioner's belated attempt to seek this Court's review of the Seventh Circuit's ruling on his motion for remand in the 1989 appeal (Petition, pp. 21-23) comes four years too late.

B. Petitioner Asserted, Then Abandoned, His Antitrust Claim In A Rule 60(b) Proceeding.

Petitioner invoked a second procedural opportunity to assert his antitrust claim when, seven months after the Seventh Circuit affirmed dismissal of his initial complaint, petitioner filed a motion for relief from judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. That motion asked the District Court to vacate the prior

dismissal, based on *Patrick*, and allow petitioner to file an amended complaint to assert the previously abandoned antitrust claim. *Lim II*, 972 F.2d at 761. The District Court denied the motion on two grounds:

> a) "the law is clear that a mere change in law, no matter how dramatic, is insufficient on its own to warrant vacating a final judgment [i.e., to constitute 'extraordinary circumstance']" and b) the plaintiff failed to pursue all possible opportunities to request a remand to amend his complaint to include the antitrust claims while his appeal was pending.

Lim II, 972 F.2d at 761.

Petitioner filed a notice of appeal from this ruling, but never filed an appellate brief. When the Seventh Circuit issued a rule to show cause why the appeal should not be dismissed, petitioner did not respond. Accordingly, petitioner's appeal was dismissed for want of prosecution. *Lim II*, 972 F.2d at 761.

Petitioner offers this Court a bizarre argument why this abandoned proceeding should not "count" for *res judicata* purposes—he did not appeal because he believed that the Seventh Circuit would rule against him (Petition, pp. 23-24), just as he abandoned his antitrust claim in the first place because he thought that the courts would rule against him. Thus, petitioner's argument comes down to the proposition that the *res judicata* doctrine is inapplicable to this Section 60(b) proceeding, not because the District Court was wrong, but because its ruling was correct and would have been affirmed.

Petitioner cites no authority for such a *non sequitur*, nor does any exist. To the contrary, it is established that an adverse decision is no less final and preclusive for *res judicata* purposes when a litigant makes a conscious, tac-

tical decision not to pursue an appeal. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S. Ct. 2424 (1981).

C. Petitioner Alone Is Responsible For His Failure To Avail Himself Of Procedural Opportunities To Litigate His Claim.

The requirement that, for *res judicata* purposes, a party must have had a full and fair opportunity to litigate an issue relates to the *procedural* opportunity rather than obtaining a judicial determination on the merits of the issue. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481, 102 S. Ct. 1883, 1897-98 (1982).[1] Petitioner had the procedural opportunity to assert his antitrust claim in the 1986 suit, but he voluntarily abandoned the claim. He had procedural opportunities to seek to reinstate that claim, either through a proper motion for leave to amend while the case was pending on appeal; through the Rule 60(b) proceeding he instituted in 1989; or through pursuing an appeal from either of those adverse rulings. He abandoned these proceedings as well. As the Seventh Circuit stated:

> [j]ust as abandonment of claims was the motif of Dr. Lim's first appeal, see *Lim*, 871 F.2d at 646, failure to follow through with the procedures he initiated is the motif of this third appeal. The plaintiff received a

[1] Petitioner's reliance on *Jones v. City of Alton*, 757 F.2d 878 (7th Cir. 1985), as establishing a different rule is misplaced. In *Jones*, the prior state court proceeding asserted as a bar to the plaintiff's Federal claims provided no procedural mechanism for asserting those claims in conjunction with his state law claims. The Federal law applicable to this case, however, not only permits but requires that all claims arising from the same transaction be brought in a single suit.

> full and fair opportunity to litigate his antitrust claim, but he neglected to prosecute the same in a lawyer-like timely and efficient manner.

Lim II, 972 F.2d at 764.

Petitioner's own analysis that he would lose on the merits if he pursued his claim does not equate with lack of opportunity to litigate. Nor does petitioner's hindsight remorse regarding his prior litigation choices exempt him from application of the principles of *res judicata*, or raise any issue meriting this Court's consideration.

D. Neither The District Court Nor The Seventh Circuit "Ignored" Any Material Facts.

Petitioner's additional argument that the courts below "unfairly" ignored or misstated facts, made without citation to any authority, is contrary to the record and presents no grounds for further review by this Court.

Petitioner complains that neither the District Court nor the Seventh Circuit mentioned that an antitrust claim similar to petitioner's was filed as a separate suit by a separate plaintiff. However, this fact has no relevance at all to the question of whether petitioner's claim is barred by *res judicata*. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S. Ct. 2424 (1981) (fact that other litigants were able to proceed on their antitrust claim arising from same facts did not preclude application of *res judicata* where plaintiffs failed to appeal prior adverse ruling).

Petitioner also asserts that the District Court's order of December 5, 1990, granting respondents' motion to dismiss on *res judicata* grounds, "fails to acknowledge" his efforts to seek remandment during the pendency of his

first appeal. Petitioner neglects to point out, however, that these purported efforts were thoroughly discussed in the District Court's subsequent memorandum opinion denying petitioner's motion for reconsideration (Pet. App. I, p. 10), and in the Seventh Circuit's opinion, *Lim II*, 972 F.2d at 761.

Finally, petitioner objects to the Seventh Circuit's statement that he failed to timely respond to the motion to dismiss. This statement accurately reflects the record. Respondents moved to dismiss petitioner's original complaint and petitioner responded, but these pleadings were rendered moot when petitioner was granted leave to file an amended complaint. *Lim II*, 972 F.2d at 762. Respondents then moved to dismiss the amended complaint, but petitioner did not respond to this motion in any way, despite numerous extensions of time to do so. His first response came in a motion for reconsideration filed over four months after the District Court had ruled on the motion. *Lim II*, 972 F.2d at 762-763. More importantly, however, the untimeliness of petitioner's response was not the basis for either the District Court's or the Seventh Circuit's ruling.

In sum, petitioner's complaints are without merit and have no bearing on the question of whether petitioner's voluntary abandonment of his antitrust claim in the prior action and failure to follow through with prior procedural opportunities to reinstate that claim barred this second suit.

CONCLUSION

Petitioner's second suit seeking to litigate a claim that he had a full and fair opportunity to litigate in prior proceedings was plainly barred by *res judicata*, as the District Court and the Court of Appeals properly ruled. That decision is soundly based on well-established law and gives rise to no issue meriting review by this Court. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JIT KIM LIM, M.D.,

Petitioner,

v.

CENTRAL DU PAGE HOSPITAL, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONSE OF THE MONA KEA DEFENDANTS* TO PETITION FOR WRIT OF CERTIORARI

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Mona Kea Leasing Association, Mona Kea Owners Association, Mona Kea South Professional Condominium Association, Richard Dominguez, M.D., James H. Grissom, M.D., Donald Gustafson, M.D., Douglas B. Mains, M.D., and Ronald M. Severino, M.D.

QUESTION PRESENTED FOR REVIEW

Whether this Court should review a decision of the Seventh Circuit Court of Appeals which upheld the dismissal of Petitioner's First Amended Complaint in that Petitioner's action was "substantially the same" as his previous suit in which he had been given a fair and full opportunity to litigate his claims, therefore, Petitioner's second suit was barred by the doctrine of *res judicata* and where Petitioner has failed to show any conflict with any decision of this Court or with the decisions of any Circuit Court of Appeals.

RULE 29.1 STATEMENT

The parties to the proceeding are all named in the caption shown on the cover of the Petition. None of the "Mona Kea Defendants" has publicly owned parents, subsidiaries or affiliates.

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RESPONSE OF THE MONA KEA DEFENDANTS TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions below are adequately described in the Petition.

STATEMENT OF JURISDICTION

The statement of jurisdiction is properly set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

As noted in the Petition, the issues raised therein arise out of the Seventh Circuit's dismissal of Petitioner's suit based on the doctrine of *res judicata*, therefore, no statutory provisions are involved.

STATEMENT OF THE CASE

The statement of the case set forth in the Petition fails to adequately describe the chronology of procedural events which, when properly noted, illustrate that Petitioner was given more than ample opportunity to pursue the antitrust claims. Petitioner's failure to take advantage of the procedural process available to him does not justify the granting of a writ of certiorari.

The First Suit

Petitioner filed an antitrust claim in the district court in 1986. Two days later the Seventh Circuit decided *Ezpeleta v. Sisters of Mercy Health Corp.*, 800 F.2d 119 (7th Cir. 1986) holding that future antitrust claims regarding staff privileges may be "deemed frivolous because of the clear bar of the state action doctrine" (A-4).[1] As a result, Petitioner voluntarily withdrew his antitrust claim. In its place, Petitioner filed a second amended complaint based upon civil rights violations. The district court dismissed

[1] Appendix page references are made to the appendices contained in the Petition.

the complaint on January 15, 1988. On May 16, 1988, the Supreme Court decided *Patrick v. Burget*, 485 U.S. 94, 108 S.Ct. 1658 (1988). *Patrick* effectively overruled *Ezpeleta*. At the time the Supreme Court decided *Patrick*, Petitioner had just filed his belated appellate brief. As aptly noted by the Circuit Court in its decision in this case, Petitioner was less than diligent in pursuing his prior appeal (A-11,12).

It was not until four months after *Patrick* was decided and four days prior to oral argument that Petitioner filed a motion in the Seventh Circuit entitled "Motion for Leave to Cite Recent Authority and for Additional Procedural Relief." As a result of *Patrick*, Petitioner sought in that motion "leave to reinstate the anti-trust counts of this litigation and for remand thereof to the district court." Petitioner, however, failed to pursue his request for remand. Counsel did not assert that position at oral argument nor did he bring it to the Court's attention in his petition for rehearing after losing in the Seventh Circuit the first time.

On March 24, 1989, the Circuit Court affirmed the District Court's judgment dismissing the civil rights counts, but did not grant Petitioner leave to reinstate his antitrust counts or remand the cause to the district court. *Lim v. Central DuPage Hosp.*, 871 F.2d 644 (7th Cir. 1989). The Circuit Court denied rehearing *en banc* on May 30, 1989. *Id.*

Five months later Petitioner filed a Rule 60(b)(6) motion in the district court. In that motion, Petitioner argued that extraordinary circumstances mandated that the district court vacate its judgment against him as a result of the *Patrick* decision. Petitioner maintained that a change in antitrust law amounted to an extraordinary circumstance. The district court denied that motion. Peti-

tioner appealed but failed to file his appellate brief even though the Circuit Court issued two orders instructing Petitioner to respond as to why the appeal should not be dismissed for lack of prosecution. Petitioner's Rule 60(b)(6) motion was eventually denied.

The Second Suit

On the same date Petitioner filed his Rule 60(b)(6) motion in the first suit, he filed a new action based on substantially the same facts as alleged in his 1986 suit. This action was assigned to the same district court as the earlier action was.

In the new action, Petitioner added new defendants, including the Mona Kea Defendants. He re-asserted his antitrust claims, and added RICO claims as well as pendent state tort claims.

In two separate opinions the district court found that *res judicata* barred the federal claims against all defendants (Appendices G and I). The Circuit Court affirmed noting as the district court had that "[t]he plaintiff has filed two cases, five separate complaints, two appeals [now four], and numerous motions to reconsider and/or vacate. At some point it is unfair to require the Defendants to repeatedly renew their defense in a case which they reasonably believed to be closed against them" (A-12).

Clearly, these facts demonstrate that Petitioner's failure to litigate the antitrust claims in the first action was a result of counsel's failure to take advantage of available procedures. As the Circuit Court correctly found "[a]t some point, there must be an end to litigation and barring the appellant's second suit on the ground of *res judicata* is an equitable method of upholding that policy" (A-12). The Circuit Court properly considered the policy consid-

erations underlying the doctrine of *res judicata* and correctly ruled that "[Petitioner's] inability to litigate his antitrust claim is the result not of a deprivation of available process, but of counsel's failure to follow through with the full and fair opportunity that was available to him" (A-12). As such, the granting of a writ of certiorari is not necessary in this matter.

SUMMARY OF ARGUMENT

The Circuit Court correctly affirmed the finding of the district court which held that the allegations of Petitioner's First Amended Complaint were "substantially the same" as those of his previous suit, which centered around his association with a chiropractor.[2] Petitioner had a full and fair chance to pursue his case in his first suit against the "Central DuPage" Defendants, which included Doctors Mains and Severino.[3] Petitioner's claims against

[2] Petitioner has never asserted that the facts of both of his claims are not identical as based on the same core of operative facts and the same injury. Further, Petitioner never disputed the fact that there was a final judgment on the initial lawsuit. Accordingly, all of the requirements necessary for the doctrine of *res judicata* to apply have been met. *In re Energy Cooperative, Inc.*, 814 F.2d 1226 (7th Cir. 1987).

[3] All "Mona Kea" Defendants, which consist of Mona Kea Leasing Association, Mona Kea Owners Association, Mona Kea South Professional Condominium Association, Richard Dominguez, James H. Grissom, Donald Gustafson, and Francis S. Lichon, were added to the second suit. Lichon was dismissed with prejudice early in the suit.

Two of the "Central DuPage" Defendants in the previous case, Mains and Severino, are represented by the same counsel as the "Mona Kea" Defendants in the second suit. Therefore, Drs. Douglas

(Footnote continued on following page)

these Defendants were correctly deemed barred by *res judicata*.[4]

ARGUMENT

PETITIONER HAS FAILED TO SHOW THAT THE SEVENTH CIRCUIT'S OPINION AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S FIRST AMENDED COMPLAINT AS BARRED BY *RES JUDICATA* CONFLICTS WITH ANY DECISION OF THIS COURT OR WITH THE DECISIONS OF ANY CIRCUIT COURT OF APPEALS AND RAISES NO QUESTION WORTHY OF THE GRANTING OF A WRIT OF CERTIORARI.

The decision by the Circuit Court illustrates that in affirming the decision of the district court, it properly considered the principles of fairness underlying the doctrine of *res judicata* and found that the doctrine was correctly applied. The decision by the Circuit Court is not inconsistent with any decision of this Court or with the decisions of any court of appeals and the petition raises no question worthy of the granting of a writ of certiorari.

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[3] *continued*
B. Mains and Ronald M. Severino, who were "Central DuPage" Defendants in the first suit, are actually "Mona Kea" Defendants in the second suit.

[4] The Mona Kea Defendants can rely on the *res judicata* doctrine because they stand in privity with Doctors Severino and Mains, who were officers of the Mona Kea condominium association, to which all "Mona Kea" Defendants belong. Petitioner never challenged the finding by the district court that held that the Mona Kea Defendants were entitled to rely upon the doctrine of *res judicata* as they stood in privity with the Central DuPage Defendants (A-9).

A. Petitioner's Failure To Take Advantage Of Procedural Safeguards Precludes His Argument That He Did Not Have A Fair And Full Opportunity To Litigate The Antitrust Claims.

It is well-established that the doctrine of *res judicata* "bars not only those issues which were actually decided in the prior action, but also any issues which *could have* been raised." *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361, 1364 (7th Cir. 1988), *cert. denied*, 488 U.S. 856, 109 S.Ct. 145 (1988); *Lee v. City of Peoria*, 685 F.2d 196, 198 (7th Cir. 1982). Here, Petitioner voluntarily withdrew the antitrust claims from his original 1986 action. He was not required to do so. Moreover, Petitioner could have raised the previously abandoned antitrust claims after this Court's May 16, 1988 decision in *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658 (1988) was decided. Nothing prevented Petitioner from requesting leave from the Circuit Court to amend his complaint in order to re-establish those claims (G-10).

However, rather than seeking the permission of the Circuit Court to amend his complaint, Petitioner elected to confine his theory of liability to claims of civil rights violations. Even though Petitioner filed a motion before the Circuit Court to have his case remanded to the district court for addition of the antitrust claims, no oral argument was ever had on the motion. Petitioner's failure to fully pursue the motion to remand and/or reinstate before the Circuit Court, "even though the *Patrick* decision was already a year old by the time the final denial for rehearing issued from [the lower] court," (G-10), completely undermines Petitioner's argument that he was not afforded a full and fair opportunity to litigate his antitrust claims.

In *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481-85, 101 S.Ct. 3107 (1981), this Court ruled that the "full and

fair opportunity to litigate" requirement concerns the procedural opportunity the claimant had to assert the claim sought to be barred by *res judicata*. In this regard, the *Kremer* Court stated that the procedural opportunity to assert a claim needs do no more than satisfy the minimal procedural requirements of the Due Process Clause in order to afford a litigant a full and fair opportunity to litigate the claim involved. *Id.* at 481. *Accord, Jones v. City of Alton*, 757 F.2d 878, 884 (7th Cir. 1985). The *Kremer* Court noted that only when there is "reason to doubt the quality, extensiveness or fairness of procedures followed in prior litigation" should the "full and fair opportunity to litigate" requirement be invoked to bar the application of *res judicata*. *Id.* at 481.

In the instant case, Petitioner was given more than a fair opportunity to litigate the merits of his antitrust claims yet he failed to avail himself of those opportunities. The Circuit Court applied well-established principles of *res judicata* and properly found that the abandoned antitrust claims Petitioner sought to reestablish were properly barred under the *res judicata* doctrine. Accordingly, Petitioner's attempt to bring these claims before this Court by way of writ of certiorari should be denied.

B. The Doctrine Of *Res Judicata* Was Properly Applied By The District Court And Affirmed By The Circuit Court.

In identifying causes of action for *res judicata* purposes, the Seventh Circuit has adopted the "operative facts" or "same transaction" test. *See, Shaver v. F.W. Woolworth, supra*; *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589 (7th Cir. 1986). For purposes of this test, a cause of action has been defined as "consisting of a 'core of operative facts' which give rise to a remedy." *In re Energy Co-op, Inc.*, 814 F.2d 1226, 1230 (7th Cir.), *cert. denied*,

484 U.S. 928 (1987) (citations omitted). "Once a transaction has caused injury, all claims arising from that transaction must be brought in one suit or be lost." *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986). Significantly, "the 'same transaction' test is decidedly fact oriented." *Id.* Here, the 'operative facts' in Petitioner's 1986 second amended complaint and his 1989 complaint are identical. In each action Petitioner sought damages arising from the same suspension of his staff privileges at Central DuPage Hospital ("CDH") as a result of his association with Dr. Chinnici, a chiropractor. Each seeks damages arising out of the same set of facts, *i.e.*, defendants' suspension of Petitioner's staff privileges at CDH as a result of his association with a chiropractic doctor. For *res judicata* purposes the complaints set forth identical causes of action. *See, Shaver, supra* at 1365 ("Since the two lawsuits involve [a] single core of operative facts, they constitute identical causes of action for *res judicata* purposes"). Further, even though a "single group of facts may give rise to different claims for relief upon different theories of recovery, under the federal definition a single cause of action remains." *Id.*

As noted by the court in *Car Carriers, Inc., supra*, this approach is consistent with the general litigation scheme established by the Federal Rules of Civil Procedure. Pursuant to the procedural rules, claimants have great latitude in amending pleadings. *See*, Fed.R.Civ.P. 15, 18. Such safeguards are also present at the appellate level. The policies and purposes behind the *res judicata* doctrine are undermined when a party fails to take advantage of the procedural rules and later attempts to relitigate claims that could have been raised in prior litigation. The purpose behind the doctrine is "that there be an end of litigation; that those who have contested an issue shall be

bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Car Carriers, Inc.*, 789 F.2d at 594, quoting, *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522, 525, 51 S.Ct. 517, 518 (1931). There is no reason that these policies should be ignored here.

Petitioner's reliance upon *Jones v. City of Alton*, 757 F.2d 878 (7th Cir. 1985), is misplaced and was properly distinguished by the Circuit Court in its decision (A-10,11). In distinguishing *Jones*, the Circuit Court first found that Petitioner failed to demonstrate that a change in law after the entry of judgment created an exception to the application of the federal *res judicata* law (A-10). Secondly, the Circuit Court correctly held that Petitioner was not prevented from relitigating the antitrust claim in the former suit, but rather he failed to take advantage of the procedural opportunity to litigate the antitrust claim after this Court's decision in *Patrick v. Burget* was handed down (A-11). Citing *Kremer*, the Circuit Court properly held that "[t]he requirement that a party have a full and fair opportunity to litigate an issue before *res judicata* may apply relates to the procedural opportunity rather than to a judicial determination of the merits of the issue" (A-11).

Additionally, Petitioner's reliance upon the *Chinnici* case is misplaced. The *Chinnici* case, dismissed in the district court in 1991, has no bearing on the case before the Court. Further, *Chinnici* is certainly not determinative as to whether the doctrine of *res judicata* was properly applied in this case. It is nonsensical for Petitioner to assert that a case, whether factually similar to the instant matter or not, can provide a basis for the granting of a writ of certiorari. This is especially true when the case upon which Petitioner seeks to rely has been dismissed.

The doctrine of *res judicata* operates to bar the same parties or their privies from re-litigating claims arising out of the same core of operative facts when a final judgment on the merits has been entered. *See, Schlangen v. Resolution Trust Corp.*, 934 F.2d 143 (7th Cir. 1991). Petitioner's assertion that the doctrine of *res judicata* is inoperable here because of the alleged pendency of the *Chinnici* case has no merit. Obviously, *Chinnici* involved a different plaintiff. Secondly, *Chinnici* was filed in 1989—the same year this case was filed, however, the doctrine of *res judicata* was applied in the instant matter as a result of the judgment that was entered in Petitioner's first suit which was filed in 1986. It was in the 1986 suit that Petitioner failed to diligently pursue his claims.

In essence, Petitioner urges this Court to ignore his 1986 law suit and the resultant judgment upon which the Circuit Court's *res judicata* decision is based and instead find that he be allowed to proceed with his 1989 suit because another plaintiff was allowed to pursue similar claims in another court. Petitioner's position is simply without merit. Unlike the Petitioner here, the *Chinnici* plaintiff apparently brought all of his claims in one suit. In the instant matter, not only does Petitioner fail to chronicle how his failure to pursue the litigation of the antitrust claims resulted in the judgments that have been entered in this and the former litigation but moreover Petitioner fails to inform the Court that *Chinnici* was dismissed. As such, *Chinnici* clearly has no relevance here.

The present matter presents a classic case for the application of the *res judicata* doctrine. The strict *res judicata* test has been met and the policies behind the doctrine support its application. Therefore, there are no questions worthy of the granting of a writ of certiorari to the Court of Appeals.

CONCLUSION

The Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals should be denied.

Respectfully submitted,

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